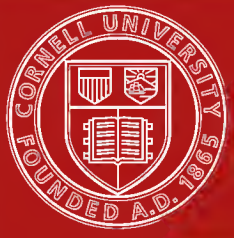

FAVORED NATION TREATMENT

AN ANALYSIS OF

THE MOST FAVORED NATION CLAUSE

WITH

COMMENTARIES ON ITS USES IN TREATIES
OF COMMERCE AND NAVIGATION

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PREFACE.

This work, or treatise more properly speaking, is published with the hope that it may be of service in determining some of the many questions arising in the interpretation of treaties of commerce and navigation. With "most favored nation treatment" in one form or another as the basis of nearly all international commercial engagements, it follows naturally that misunderstandings as to the scope and meaning of this term are of frequent occurrence. The author's experience in the practical working of international law has led him to realize the need of some work on this subject, and while he by no means entertains the hope that his own may be accepted as authoritative, he believes that the citations, given at length, will save the time and labor of the investigator.

The decisions of the Supreme Court of the United States, universally conceded to be of the highest authority, are a mine of the principles of international law governing commerce and the commercial relations of states. This is the result, not only of the high standing of that tribunal, but of the conditions attendant upon the union of sovereign states, now forty-five in number, which have ceded to the federal government the power to regulate commerce among them and with foreign countries. These decisions containing the clearest definitions of commerce, navigation, imports, exports, etc., have been freely quoted.

The author begs to acknowledge his indebtedness to the officials of the Department of State of the United States by whose courtesy he was allowed access to the archives of the Department. He also avails himself of this occasion to express his thanks to the members of the Executive Committee of the Association of the Bar of New York City for the privilege of using the Association's excellent library.

PARIS, July 3, 1901.

ABBREVIATIONS.

Am. St. Papers, F. R. . . .	American State Papers, Foreign Relations.
Cranch.	Cranch's United States Supreme Court Reports.
Dip. de la Mer.	Diplomatie de la Mer.
Droit Int.	Le Droit International.
For. Rel.	Foreign Relations of the United States.
Ho. Ex. Doc., — Con., — Sess.	House of Representatives, Executive Document, — Congress, — Session.
Howard.	Howard's United States Supreme Court Reports.
Int. Law.	International Law.
Op. Atty. Gen'l.	Opinions of the Attorney General of the United States.
Peters.	Peters United States Supreme Court Reports.
Rev. Dip. Int.	Revue Diplomatique Internationale.
Sen. Ex. Doc., — Con., — Sess.	Senate Executive Document, — Congress, —Session.
Wall.	Wallace's United States Supreme Court Reports.
Wheaton.	Wheaton's United States Supreme Court Reports.
U. S.	United States Supreme Court Reports.

FAVORED NATION TREATMENT.

CHAPTER I.

With the rise of civilization, the progress of science, and improvements in the mechanical arts, which have encouraged and facilitated intercourse among nations, have come an increase in commerce, and a growth in the importance of the rules which govern the commercial relations of States. The objects of formal conventions determining these rules,—called treaties of commerce and navigation,—are to secure profitable markets for the productions of the contracting parties, protection for their merchants or agents, who are necessary to trade, and security and facility in commercial transactions.[1] De Martens[2] describes commercial treaties as containing three kinds of clauses:

1. Those relating to the subjects or citizens of the contracting powers in regard to their civil rights;

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[1] H. Bonfils, Droit Int. Public, sec. 918, p. 459.

"Les traités de Commerce ont pour objet de déterminer les conditions dans lesquelles doiveut s' éffectuer les échanges et les transactions commerciales entre les sujets des Etats contractants. Ils ont pour but de concilier les intérêts respectifs des Etats dans leurs relations de production et d' échange, d' ouvrir des débouchés à leurs produits; fusion, quand ces intérêts sont identiques; transactions entre ces intérêts, quand ils sont dissemblables. Les traités de commerce reglent l' importation, l' exportation, le transit on l' entrepôt des marchandises, fixent les taxes conventionnelles auxquelles elles seront soumises ou l' entrée en franchises dont elles jouiront, determinent les garanties, et les avantages qui seront accordés aux commerçants de chacun des Etats signataires sur le territoire de l' autre.

[2] De Marten's, Droit Int., Tome II. pp. 314–315.

2. Those relating to the rights reciprocally granted to these subjects in all that concerns navigation;

3. Those which concern commerce properly speaking.

These clauses as above described determine the regulations governing importation, exportation, transit, transshipment, warehousing, customs tariff; the rights of navigation, (lights, anchorage, pilotage, buoys, etc.,) quarantine; transit charges on streams and canals; lying in of vessels in ports and basins; storage of merchandise in bonded warehouses; fisheries; rights of possession and transmission of movable or immovable goods; payment of, or exemption from imposts, extraordinary contributions, and forced levies; service in the army or militia; conditions of nationality, the establishment of consulates, etc., etc.[1]

If the commerce of a State were limited to an exchange of commodities with one of its neighbors, and the conditions of production and exchange were little effected by time, a treaty might be made setting out clearly the extent to which every right and privilege was to be enjoyed in the future by the contracting parties. Such a treaty would be called a treaty in detail. But the complex nature of commercial relations at the present day, the changes of policy by governments, the building up of domestic industries, etc., would render such treaties impracticable, inasmuch as they would be subject to constant amendment, and would be burdened with such a mass of detail as to make their negotiation almost an impossibility.

In order, therefore, to preserve their rights and to prevent any future discriminations unfavorable to them and to their commerce, States have adopted two methods to supplant the treaty in detail. They are:

[1] Calvo, Droit Int., Tome III, p. 365. See also De Martens, Droit Int., Tome II, p. 314–5.

1. National treatment.
2. Most favored nation treatment, or
3. Both national and favored nation treatment.

As a general rule, national treatment secures to the foreign merchant who enjoys its benefits the same rights and privileges as a native subject or citizen in all that concerns his residence, property, commercial transactions and the importation and sale of his goods, and it obtains for the foreign State the same treatment for its merchant vessels as is secured to native vessels.

Most favored nation treatment, on the other hand, leaves each party free to make what internal regulations it pleases, and to give what preference it finds expedient to native merchants, vessels and productions.[1] Its object is to prevent any unfair discrimination against the merchants, vessels and productions of the contracting party in favor of those of another State, and, owing to its greater scope, the privileges secured by it may be supe-

[1] "Though treaties which merely extend the rights of the most favored nations are not without all inconvenience, yet they have their conveniences also. It is an important one that they leave each party free to make what internal regulations they please, and to give that preference they find expedient to native merchants, vessels and productions. And we already have treaties on this basis with France, Holland, Sweden, and Prussia, the two former of which are perpetual, it will be but a small additional embarrassment to extend it to Spain. On the contrary, we are sensible it is right to place that nation on the most favored footing, whether we have a treaty with them or not; and it can do us no harm to secure by treaty a reciprocation of the right. . . . 1st. If we quit the ground of the most favored nation as to certain articles for our convenience, Spain may insist upon doing the same for other articles for her convenience, and thus our commissioners will get themselves on the ground of *a treaty of detail*, for which they will not be prepared. 2nd. If we grant favor to the wines and brandies of Spain, then Portugal and France will demand the same; and in order to create an equivalent Portugal may lay a duty on our fish and grain, and France a prohibition on our whale oil, the removable of which will be proposed as an equivalent."

Mr. Jefferson (Secretary of State) report on negotiations at Madrid. Am. State Papers, For. Rel. Vol. I, pp. 134-5.

rior to those secured by national treatment.[1] Imports being in their essence *foreign*, it is impossible that they receive national treatment. The rate of duty on them must be fixed either by a treaty wholly, or in part, in detail, by a supplementary convention confined to duties on imports and exports, or by the legislature of the State; and the favored nation clause is usually resorted to by foreign States to secure an uniformity of charges and to prevent unfair discriminations.[2]

Modern treaties of commerce and navigation are composed of clauses or articles. Each article describes the rights and privileges to be enjoyed in regard to a certain subject falling under the broad and general heads of commerce and navigation. These particular rights may be specified in detail or may be secured by national treatment, by favored nation treatment or by both.[3]

As navigation and commerce, however, incorporate such a variety of subjects, which could not well be specified in particular, it is customary for the negotiators to supply any omission that may have been made by the

[1] Treaty of 1858 with United States, giving freedom from tonnage dues to Belgium vessels in United States ports, was terminated, upon notice given July 1, 1874, by Mr. Jones, Minister at Brussels, to the Belgium Minister of Foreign Affairs. The former said: "Notice was only given because it had become necessary for my Government to abrogate the fourth and thirteenth articles of the treaty; that these articles in their practical operation, and under the favored nation clause, in the treaties with the Hanseatic Republics, work a discrimination against our commercial marine, and in favor of foreign vessels, and are giving considerable trouble." Mr. Jones to Mr. Fish, U. S. For. Rel. 1874, p. 64.

[2] Dans les traités de commerce contemporains on stipule ordinairement que toutes les marchandises étrangères et tous les produits de l'industrie étrangère peuvent être importés *en payant les droits de douane*. L'élévation de ces droits est fixée, soit par la legislation intèrieure, soit par des accords internationaux. Dans ce dernier cas il est convenu habituellement que les droits de douane payés par les sujets de tel on tel pays serviront de règle pour établir le tarif applicable aux sujets de la nouvelle puissance contractante. C'est se qu'on appele les droits de "la nation la plus favorisee."

De Marten's Droit Int., Tome II, pp. 321, 322, sec. 2.

[3] See treaty Japan and Great Britain, June 16, 1894.

general clause of the most favored nation.[1] While its use is not confined to treaties of navigation and commerce, but extends to consular, trade-mark, and other conventions, it is as broad as the basis of the treaty in which it is employed, and is intended to include all subjects which fall properly under the general heading or title of the formal agreement.

The article enjoins the spirit of fair and equal legislation and is designed as a stipulation that no unfriendly regulations shall be resorted to by one party against the other, nor any preference given in the future with an intent to injure or prejudice either party.[2] Its object is twofold,—to supply omissions by covering the whole field of commerce and navigation, or other matters of which it treats, and to insure fair and equal treatment in these respects during the life of the convention.

The ordinary forms of the clause as it appears in modern treaties are as follows:

(*a*) The simply reciprocal form. "The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor, or immunity which either contracting party has already granted, or may hereafter grant to any other State, shall become common to the other party."

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[1] La coutume s'est etablie d'inserer dans la plupart de ces traités la clause dite *de la nation la plus favorisée*. Elle assure que chacun des États contractants donnera des advantages qui seront accordés ou qui ont été deja accordés à d'autres États par d'autres traités de commerce. Les avantages et les inconvenients engendrés par celle clause ont été tres discutés pendant les vingt dernieres anneés. Bonfils, Droit Int. Public, Sec. 918, p. 459.

[2] "The article of the treaty under consideration was designed as a stipulation, that no unfriendly legislation should be resorted to by one party against the other, nor any preference given to the product of the other countries, with intent to injure or prejudice either party to the treaty. The treaty enjoins the spirit of fair and equal legislation." Mr. Webster to Mr. de Figaniere e Morao, Feb. 9, 1842. Report 107, Committee For. Rel. Ho. Rep. 31st Con. 2d Sess. Also *Bartram* v. *Roberts*, 122 U. S. 116. Also Ferguson's Int. Law, sec. 152.

(*b*) The qualified reciprocal form, so called because of the qualifying clause appended owing to the many discussions concerning the interpretation of "favor." "The high contracting parties agree that, in all that concerns navigation and commerce which either contracting party has already granted or may hereafter grant to any other State, shall become common to the other party, who shall enjoy the same (the favor) freely if the concession was freely made, or upon allowing the same compensation, if the concession was conditional."

(*c*) The imperative and unconditional form. "The high contracting parties agree that, in all that concerns commerce and navigation, which either contracting party has already granted, or may hereafter grant to any other State, shall immediately and without condition become common to the other party."

(*d*) The unilateral form appearing in treaties between Christian, or civilized, and semi-civilized States, whereby the civilized power reserves to itself alone favored nation treatment, usually imperative and unconditional.

(*e*) The specialized or contracted form which applies to but one subject of commerce, as for instance, "imports." "No other or higher duties shall be imposed on the importation of any article, the growth, produce or manufacture, of the high contracting parties than are or shall be payable on the like articles being the growth, produce or manufacture of the most favored nation, (or any other nation or foreign country).

In lieu of the words "any other State" or "any other nation" there is often substituted the phrase "subjects, citizens or inhabitants of any other State" as expressing all those agencies of a State which engage for profit in commerce and navigation. No State in its sovereign capacity does so, or, if it should, would it so engage otherwise than as a commercial corporation or juridical person with all

the embarrassments attendant upon an ordinary commercial association embarked in the same enterprise.

In the analysis of the most favored nation clause we have :

1. The favor,
granted to
2. Citizens, subjects or inhabitants,
in matters of
3. Commerce
and
4. Navigation.

CHAPTER II.

The interpretation of the most favored nation clause in its simple and reciprocal form, namely: "The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor, or immunity which either contracting party has already granted, or may hereafter grant, to any other State, shall become common to the other party," has been a cause of lengthy discussion during the past century. The question in dispute has been whether a nation on granting a privilege, favor, or immunity to some one other State in exchange for a valuable consideration granted by that State to it, was obliged to grant immediately and unconditionally the same privilege, favor, or immunity to all other States enjoying the privileges of the most favored nation clause in its simple reciprocal form; or whether the States demanding the privilege by virtue of the clause should not grant to the nation from whom it was sought the same equivalent or consideration that the latter had secured from the State to which the concession was first granted. While the language seems simple enough, the words alone, "literally expounded, will go a very little way towards explaining its meaning."[1] The technical rules of treaty interpretation must be resorted to for a clear understanding of the intent and purpose of the clause. Those applicable to the present case are set out most clearly by Hall.[2]

"3. When the words of a treaty fail to yield a plain

[1] Lawrence's Wheaton, p. 498.

[2] Hall's Int. Law (4th ed.), pp. 350-355.

and reasonable sense, they should be interpreted in such one of the following ways as may be appropriate:

"*a*. By recourse to the general sense and spirit of the treaty as shown by the context of the incomplete, improper, ambiguous, or obscure passages, or by the provisions of the instrument as a whole.

"*b*. By taking a reasonable instead of the literal sense of the word when the two senses do not agree.

"4. Whenever, or in so far as, a State does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights."

Applying rule 3, an examination of treaties containing the simple reciprocal form of the most favored nation clause discloses the fact that they all have reciprocity as their foundation;[1] every particular concession in duties, exemptions, protection to vessels, rights of citizens or subjects, etc., is granted in consideration of a like concession to the granting power. Where reciprocity is the foundation of every clause in the treaty dealing with a subject of commerce and navigation, the inference points to reciprocity as the foundation for the general covering clause which is to supply omissions and prevent future unfavorable discriminations.[2]

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[1] Cette stipulation, suivant les termes dans lesquels elle est libellée, est tantôt gratuite, tantôt conditionelle et surbordonnée à des concessions egales ou equivalentes a celles qui ont été faites par le pays dont elle generalise la situation privilegiée.

La réciprocité du traitement national et des avantages echangés est sans doute la base habituelle de cette sorte de traités; néanmoins on pourrait en citer dans lesquels les avantages respectivement stipulés sont loin de former un equivalent exact. Calvo, Droit Int. (Ed. 1896) p. 365.

[2] (Columbia):

"The only important point now to be settled as the radical principle of all our future commercial intercourse is the basis proposed by Mr. Torres, of *reciprocal utility and perfect equality*, as the necessary consequence of which you will claim that, without waiting for the conclusion of a treaty, the commerce and navigation of the United States, in the ports of the Co-

This inference becomes a certainty when examined in the light of rule 4. A literal interpretation of the clause would deprive a State bound by it of one of its important attributes of sovereignty. So interpreted the clause would stand as a bar to a state's making any special arrangement of advantage upon terms of reciprocity with another State. Such restrictions upon the full and complete sovereignty of a nation must be traced up to the consent of the nation itself. They can flow from no other legitimate source.[1] If the nation has so bound itself, it should be clearly shown by the addition of the words "immediately and unconditionally" or their equivalents, which describe the terms upon which the favor is to be granted.[2] It would require the clearest language to justify the conclusion that a government intended to preclude itself from special engagements of advantage with other countries which might in the future be of the highest importance to its interests.[3]

If such an interpretation were to be accepted it would result that the simple reciprocal clause would, in operation, confer privileges more extensive than those where concession to another is appealed to and recognized as the standard of common enjoyment.[4] It would place the

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lombian Republic, should be received on the footing of equality with the most favored nation." Mr. J. Q. Adams to Mr. Anderson, Am. State Papers, F. R. vol. V, p. 890.

[1] "*The Exchange*," 7 Cranch, p. 116.

[2] See Treaty.

[3] *Whitney* v. *Robertson*, 124 U. S. p. 190.

[4] 16 Op. Atty. Gen'l, p. 628.

The exaction of tonnage duty, under section 15 of the act of July 14, 1862, upon Hanseatic vessels is not in contravention of treaty obligations arising out of the treaty between the United States and the Hanseatic Republic of Dec. 20, 1827.

The section named provided that "a tonnage duty of ten cents, in addition to any tonnage duty now imposed by law," should be laid upon all vessels "which after the 31st of December, 1862, shall be entered at any Custom House in the United States from any foreign port or place; pro-

nation obtaining the concession not upon the footing of the most favored nation, but on a footing more favored than the one to which the concession was originally granted not as a free gift, but a purchase at a fair and equal price.[1]

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vided that nothing in this act contained shall be deemed in any wise to impair any rights and privileges which shall have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty or tonnage of vessels.

The claimants contended that the exemption given to Greece by the proclamation of President Van Buren June 14, 1837, authorized by the act of 1833, by virtue of article nine of the treaty of December 20,1837, immediately became common to the Hanseatic Towns, and therefore, as regards the latter, remained unaffected by the acts of 1862, being a privilege acquired under a treaty of the United States.

The Hanse Towns did not derive exemption from treaty, and if they had, the act of 1862 did not have the sense contended for.

In the course of the opinion, the Attorney General said: "It would be a singular result if what is known as the most favored nation clause in treaties were to be allowed an operation to confer privileges more extensive than those where concession to another is appealed to and recognized as the standard of common enjoyment."

Treaties and Conventions between the United States and other Powers, p. 1278.

[1] L'application de cette formule n'est pas toujours juste. Dans la practique on s'est demandé à une concession en matiere de tarifs douaniers, ou toute autre concession, faite au profit du commerce d'un Etat, devait immaquablement étendre ses effets aux sujets de tous les autres Etats ayant obtenu les droits "de la nation la plus favorisée." C'est a tort que l'on exige cette application en toute circonstance. Il est nécessaire, selon nous, de distinguer le cas ou quelque avantage commercial est accordé a un État purement et simplement, et le cas ou il s'agit d'un échange de bons procédés ou d'un dé-dommagement. Ce n'est que dans la premiere hypothèse que les autres États ont le droit de réclamer a leur profit le même avantage. Au contraire, dans la seconde, une pareille exigence serait contraire au principe de la réciprocité des obligations commerciales. En presence des malentendus occasionées par cette formule "de la nation la plus favorisée" on la remplace quelquefois dans les traités par une définition plus exacte. On convient que les parties contractantes "se concedent mutuellement tous les avantages relatifs au commerce et à la navigation, accordés par elles gratuitement ou avec compensation à n'importe quelle autre puissance."

Il va de soi que les gouvernements qui, comme celui de la Russie, n'admettent pas la liberté commerciale au sens des "*free traders*," demeurent partisans des *tarifs douaniers indépendants.* C'est pourquoi tous les États qui se placent à ce point de vue se reservent dans les traités de commerce

The stipulations of the conventions governing the commercial relations of nations are based upon utility and reciprocity. Gratuitous concessions taken in a literal sense are unknown.[1] Each State wishes to obtain from others a maximum of advantage with the least possible sacrifice on its own part, and their formal convention establish the point of compromise. General reductions in tariff or concessions of rights to aliens in no measure detract from the operation of this law. They are made from policy, in a belief that such actions will directly or indirectly benefit the condition of the State which grants them, either in its internal welfare, or in the well-being of its citizens or subjects in foreign countries, or in the sale of its products abroad.

The case of greatest importance in determining the meaning of the simple reciprocal clause was that of the interpretation of article 8 of the Treaty of 1803 between France and the United States, providing for the cession of the Territory of Louisiana. The case is given in full in a subsequent chapter.[2] The result of the contention of France, lasting through a period of fourteen years, was that more care was taken in the drafting of the favored nation clause in treaties negotiated by the United States and other powers subsequent to 1817, and the article as

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la liberté de modifier les tarifs. De Marten's Droit Int., Tome II, pp. 321–322.

[1] Mr. J. Q. Adams to Mr. de Neuville, Am. State Papers, F. R. vol. V, p. 152.

". . . constantly keeping in view, that 'tis folly in one nation to look for disinterested favors from another; that it must pay with a portion of its independence for whatever it may accept under that character; that by such acceptance it may place itself in the condition of having given equivalents for nominal favors, and yet being reproached with ingratitude for not giving more. There can be no greater error than to expect or calculate upon real favors from nation to nation. 'Tis all illusion which experience must cure—which a just pride ought to discard." Washington's Farewell Address, Am. State Papers, F. R., vol. I, p. 37.

[2] See p. 17.

found in these treaties nearly always has the qualifying phrase "who shall enjoy the same (the favor) freely if the concession was freely made, or upon allowing the same compensation if the concession was conditional."[1] It is not to be presumed from the addition of these words that the clause in its simple form intended any but gratuitous favors,—the words are mere surplusage added out of extreme caution.[2] The interpretation of the simple reciprocal clause remains the same, and those who aim at securing other than gratuitous favors without granting an equivalent compensation insert in the favored nations clauses of their treaties the words "unconditionally and immediately," or other words of the same import.[3]

While the interpretation calling for an exchange of equivalents has been called the "American" view, it will be found upon an examination of the diplomatic history of the last century, that it has at times been accepted by nearly all Western Nations; and that its strongest oppo-

[1] Treaties containing qualifying clause concluded from 1778 to 1887 by United States: Argentine Confederation, 1853, art. 8; Austria, 1829, art. 5; Belgium, 1845, art. 15; Bolivia, 1858, art. 1; Brazil, 1828, art. 2; United States of Central America, 1825, art. 2; Chili, 1832, art. 2; Colombia, 1824, art. 2; New Grenada, 1846, art. 2; Costa Rica, 1851, art. 3; Denmark, 1857, art. 4; Ecuador, 1839, art. 2; France, 1778, art. 2; Hanover, 1846, art. 6; Hanseatic Republics, 1827, art. 2; Hawaii, 1849, art. 2; Hayti, 1864, art. 2; Honduras, 1864, art. 3; Italy, 1871, art. 24; Liberia, 1862, art. 6; Mecklenberg-Schwerin, 1847, art. 7; Mexico, 1831, art. 2; Nicaragua, 1867, art. 3; Oldenburg, 1847, art. 6; Paraguay, 1859, art. 3; Peru, Bolivia, 1836, art. 2; Peru, 1851, art. 3; Peru, 1870, art. 3; Prussia, 1785, art. 26; Prussia, 1828, arts. 2, 3; Russia, 1832, art. 2; Salvador, 1850, art. 2; Salvador, 1870, art. 2; Sardinia, 1838, art. 9; Sweden, 1783, art. 2; Two Sicilies, 1845, art. 1; Two Sicilies, 1855, art. 15; Venezuela, 1860, art. 9.

[2] Cette stipulation, suivant les termes dans lesquels elle est libellée, etc. tantôt gratuite, tantôt conditionelle et surbordonnée à des concessions equales, ou equivalentes à celles qui ont ét éfaites par le pays dont elle generalise la situation privilegiée.

La reciprocité du traitement national et des avantages echangés est sans doute la base habituelle de cette sorte de traités; neanmions on pour rait en citer dans lesquels les avantages respectivement stipulés sont loin de former un equivalent exact. Calvo, Droit Int. (ed. 1896), Tome III, p. 365.

[3] De Martens, Droit Int., Tome II, pp. 321–2.

nents are those nations whose policy is free trade and who incline to the use of the imperative and unconditional form of the clause (c). Having through policy and in belief that the State is so best served reduced their imposts and charges upon commerce and navigation to the minimum, they have no further compensating equivalents to offer for concessions on the part of other States, and the favor, if it is to be secured, must flow from gratuitous legislation, or, by the operation the most favored nation clause, from the action of a third power. Initiated by Great Britain and encouraged by France in 1860, the free trade policy had wide influence, and thirty years ago formed a basis of commercial treaties throughout Western Europe. Russia and the United States alone of the great commercial nations remained strictly protective.[1]

After the Franco-Prussian War, France under Thiers, Germany under Bismark, and Austria became more inclined towards protection, and the tendency of governments seems now to be in that direction. Where protection is at the foundation of the commercial policy of a nation, the simple reciprocal or qualified clause will nearly always be found in their treaties.

As has been before stated, each separate clause of a treaty may describe the rights and privileges to be enjoyed in regard to a certain branch or subject of commerce or navigation, and further secure it against future discriminations by favored nation treatment specifically applied. This has been set out under the different forms as the specialized or contracted form (*e*). Its most common form or the one which is most often invoked for the protection of the subjects of which it treats, is that which relates to imports and exports, and it requires for them the same treatment as is granted to the imports and exports of the most favored nation, or of any other nation,—

[1] De Martens, Droit Int. Tome II, pp. 321-2.

the two forms of expression being, in contemplation of law, synonymous. It is but a contracted form of the general clause of the most favored nation and in its interpretation must fall under the same rule, and, as it is simple and reciprocal in nature, it is a pledge of the contracting parties that neither will impose discriminating duties upon the goods of the other. "It has not greater extent, it was never designed to prevent special concessions, upon sufficient considerations." The first article of this character appearing in American treaties was article 2 of the Treaty with Great Britain of 1794, and the correspondence relating to its negotiations, as well as to its adoption in the treaty of 1815, shows the specialized and contracted nature of the clause.[1]

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[1] The treaty of February 8, 1867, with the Dominican Republic (art. 9) provides that "no higher or other duty shall be imposed on the importation into the United States, of any article the growth, produce or manufacture of the Dominican Republic, or of her fisheries, than are or shall be payable on the like articles the growth, produce or manufacture of any other foreign country or of its fisheries." The Convention of January 30, 1875, with the King of the Hawaiian Islands provides for the importation into the United States, free of duty, of various articles, the produce and manufacture of those Islands, (among which were sugars,) in consideration of certain concessions made by the King of the Hawaiian Island to the United States.

Held, that this provision in the treaty with the Dominican Republic did not authorize the admission into the United States, duty free, of similar sugars, the growth, produce or manufacture of that Repnblic, as a consequence of the agreement made with the King of the Hawaiian Islands, and that there was no distinction in principle between this case and *Bartram* v. *Robertson*, 122 U. S. page 116. . . .

Opinion:

". . . . The counsel for the plaintiffs meet this position by pointing to the omission in the treaty with the Republic of San Domingo of the provisions as to free concessions and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our Government to another country, without that concession being at once extended to San Domingo. We do not think that the absence of this provision changes the obligations of the United States. The 9th article of the treaty with that Republic, in the clanse quoted, is substantially like the 4th article in the treaty with the King of Denmark. And as we said of the latter, we may say of the former, that it is a pledge

of the contracting party that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has not greater extent, it was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our Government intended to preclude itself from such engagements with other countries, which might in future be of the highest importance to its interests."

Mr. Randolph advised the exclusion of the term "the most favored nation" as being productive of embarrassment (on account of the French Treaty). He, however, was willing to extend it to the admission of goods, and there resulted the creation of that clause "no higher or other duties," etc. Mr. Randolph to Mr. Jay, Am. State Papers, For. Rel. vol. I, p. 473.

"The article for placing, respectively, the two countries on the footing of the most favored nation, limited, as was insisted on by the British plenipotentiaries, to the intercourse between the United States and the European territories of Great Britain, was unnecessary, since all that appears desirable on that subject was secured by article 2; and a provision of that nature, unless offering some obvious advantage, was deemed embarrassing, on account of the difficulties attached to its execution." Messrs. Adams, Clay and Gallatin, Am. Plenipotentiaries to Mr. Monroe, Sec. State, July 3, 1815, Am. State Papers, F. R. vol. IV, page 11.

CHAPTER III.

By the Treaty of 1803 between the United States and France providing for the cession to the former of the Territory of Louisiana, it was stipulated[1] that, for a period of twelve years, French ships coming directly from France or her colonies laden with the produce of those places respectively, were to enjoy in the ports of Louisiana the same treatment as American vessels arriving from the same countries carrying similar products. This exceptional treatment was granted to French and Spanish vessels alone, and it was further provided that it should not be extended to any other nation. Article VIII of the same Treaty stipulated that "in the future and forever after the expiration of the twelve years the ships of France" should "be treated upon the footing of the most favoured nation in the ports above mentioned."

By Treaty of July 3, 1815, with Great Britain, the United States granted, upon terms of reciprocity, national treatment in all her ports to British vessels engaged in the direct trade between the two countries.

In 1817, the special treatment for French vessels in the ports of Louisiana guaranteed by article VII of the treaty of cession for the period of twelve years had been withdrawn. The Territory of Louisiana had been admitted into the Union, and as a State was subject to the provisions of the Constitution. Thus, British ships in ports of Louisiana, as in the ports of other States of the Union, enjoyed by virtue of treaty stipulation national treat-

[1] Art. VIII.

ment, which was denied to French vessels, since France refused to grant the equivalent by which Great Britain had purchased the privilege. In that year, France, relying upon the most favored nation provisions in article VIII, entered a claim for the like treatment for her vessels in Louisiana ports, as was enjoyed by British vessels, and maintained that if it was withheld, her navigation would suffer from unfair discriminations imposed upon it by the United States.

The controversy extended over a period of fourteen years, and the correspondence incident to it furnishes an exhaustive commentary upon the meaning and scope of the simple form of the most favored nation clause.

Extracts from the more important documents, containing the essential points in the arguments of the parties to the dispute are given below:

Mr. de Neuville, Chargé d'Affaires of France, referred to the Article as "a clause which is absolute and unconditional by its own terms, and which can neither be limited or modified, being the essential unlimited condition of a contract of cession, can neither be subject to limitation nor to any modification whatever."[1]

Mr. J. Q. Adams to Mr. de Neuville. "The eighth Article of the Treaty of cession stipulates that the ships of France shall be treated upon the footing of the most favored nations in the ports of the ceded territory; but it does not say, and cannot be understood to mean, that France should enjoy, as a free gift, that which is ceded to other nations for a full equivalent.

"It is obvious that if French vessels should be admitted into ports of Louisiana upon payment of the same duty as vessels of the United States, they would be treated, not upon the footing of the most favored nation, according to the article in question, but upon a footing more

[1] Am. State Papers, F. R. vol. V, p. 152.

favored than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair and equal price.

"It is true that the terms of the eighth article are positive and unconditional; but it will readily be perceived that the condition, though not expressed in the article, is inherent in the advantage claimed under it. If British vessels enjoyed in the ports of Louisiana any gratuitous favors, undoubtedly French vessels would, by the terms of the article, be entitled to the same."[1] Mr. de Neuville seemed to acknowledge Mr. Adams's contention but argued that the cession of Louisiana was a *quid pro quo*. "I shall, in the first place, have the honor to observe, that France asks not for a *free gift*." "She claims the enjoyment of a right which it is not even necessary for her to acquire, since it proceeds from herself, being a right which, even when she consented to dispose of Louisiana, she had the power to reserve for the interests of her trade, and the actual reservation of which is established, not impliedly, but in the most precise and formal terms by the eighth article of the Louisiana treaty.

"France, I repeat, asks no free gift, since the territory ceded is the *equivalent* already paid by her for all clauses, charges, and conditions, executed, or which remain to be fulfilled by the United States, and which principally consist in the 7th and 8th articles of the treaty, and 1st of the convention."

He maintained that the wording of the article proved his contention, since in all other favored nation clauses in treaties between the United States and France, the words "freely, if freely granted to other nations, or upon

[1] Am. State Papers, F. R. vol. V, pp. 152, 153.

granting the same conditions, if conditionally granted," were used.[1]

Mr. de Neuville to Mr. Adams. "It would appear to me that the negotiators, on their part, had but one and the same object in inserting the 7th and 8th articles. Their express intention was to secure forever to French vessels in the ports of the ceded territory, a real advantage over those of all other nations; and, in my opinion, the very expression of the article established in the most positive terms, that intention of the negotiators."[2]

Mr. J. Q. Adams to Mr. de Neuville. "A maxim founded in that justice is at once the highest glory and soundest policy of nations that every favor granted to one ought equally be extended to all. It is no exception, but an exemplification of this principle, that the vessels of England, Prussia, The Netherlands, and the Hanseatic Cities pay in the ports of the United States, including those of Louisiana, no other or higher duties than the vessels of the United States. This is not *a favor*, but *a bargain*. It was offered to all nations by an Act of Congress of March 3, 1815. Its only condition was reciprocity. It was always, and yet is, in the power of France to secure this advantage to her vessels. . . . They were far from anticipating that, instead of this, France would found, upon equal reciprocity, offered to all mankind, a claim to special privileges, never granted to any one. Special, indeed, would be the favor which should yield to a claim of free gift to one of that which had been sold at a fair price to another. . . . France consulted what she thought her own interest, and instead of reciprocity, aggravated discriminating duties to prohibition. She exercised her rights, but if, in levying these prohibitory duties, there was no disfavor to the United

[1] Am. State Papers, F. R. vol. V, pp. 153–54.
[2] *Ibid.* p. 162.

States, surely as little can it be alleged that the extension of reciprocal advantages to all is a grant to anyone of a *favor*.

"It is observed in the reply of Mr. de Neuville, dated the 18th of June, 1818, to the letter of this Department of the 23d of December preceding, that France, by claiming *forever*, in the ports of Louisiana, the full enjoyment of every advantage enjoyed by any other nation in all the ports of the Union, as the price of equivalent advantages secured to the United States, still claims nothing gratuitous, inasmuch as the equivalent for this special advantage to France was already paid in the cession of Louisiana itself. This idea is not only contradicted by the whole tenor of the Louisiana treaty, and by the special and obvious purport of the seventh and eighth articles, but I hesitate not to aver, that if the American Government had believed those articles to be susceptible of such a construction, and had those articles *alone* been presented to them as the *whole* price for the cession of Louisiana, they never would have accepted it upon such terms; for such terms would not only have destroyed the effect of the cession of the province *in full sovereignty*, they would not only have been in direct violation of the Constitution of the United States, but they would have been a surrender of one of the highest attributes of the sovereignty of this whole nation; they would have disabled this nation forever from contracting with any power on earth but France for any advantage in navigation, however great, and however amply compensated; it would have been little short of a stipulation never to conclude a commercial treaty with any other nation than France; for what else are commercial treaties but the mutual concession of advantages for equivalents? And if every advantage obtained from others for equivalents were, by retrospective obligations of this article to be secured as

already paid for by France, they would have been secured to her not only in the ports of Louisiana, but in those of the whole Union; such a treaty far from being an acquisition of the whole sovereignty of Louisiana, would have been, on the part of the United States, an abdication of their own." Articles seven and eight were not considerations. The equivalents were not included in this treaty. Cession was in treaty; the equivalents in two other conventions of same date. Cession was regulated by one compact, and the equivalent given for it by others. The motive of the articles was simply to encourage commerce.

In regard to Mr. de Neuville's statement that in all other treaties between the United States and France, the favored nations clauses contained the provision "gratuitously, if the concession is gratuitous, or by granting the same compensation, if the concession is conditional . . . ," Mr. Adams replied: "The mutual stipulation of being treated as the most favored nation is not, in all the treaties between France and the United States, accompanied by the express declaration that the favor granted to a third party shall be extended to France or the United States gratuitously, if the grant is gratuitous, and upon granting the same compensation, if conditional."

This form of the clause was in only one treaty, namely, that of February 6, 1887—the first treaty between the two countries, and it was never repeated. It was alluded to and applied in the Consular Convention of 1778, but not in the Treaty of September 30, 1800. "There is not a word in this article (art. 6) nor in the whole convention, saying that these favors shall be enjoyed freely, if freely granted to others, or upon granting the same conditions, if conditionally granted; yet who can doubt that this was applied in the article, though not expressed. . . . It may be concluded that, as the parties had

before repeatedly contracted the same engagements at one time with, and at another time without, the explanatory clause, but always intending the same thing, this variety of modes of expression was considered by them as altogether immaterial, and that, whether expressed or not, no claims to a favor enjoyed by others could justly be advanced by virtue of any such stipulation, without granting the same equivalent with which the advantage had been purchased. . . . If it be admitted that, in a contract of sale, nothing can be understood by implication, (*sous-entendre*) this principle would be no less fatal to the claim of France than every admissible rule of reason; for what implication could be more violent and unnatural than that by a stipulation to treat the ships of France on the footing of the most favored nation, in *the ports of Louisiana*, the United States had disabled themselves forever from purchasing a commercial advantage from any other nation, without granting it particularly to France?"[1]

Mr. de Neuville replying to Mr. Adams, argued as follows: "Is there but one way of obtaining the right of being treated upon the footing of the most favored nation?" In almost all treaties of the United States, he finds that parties go on to explain that the favor shall be free, if freely granted, etc., and from this he concludes that the right to be treated on the footing of the most favored nation can be enjoyed in two ways,—either gratuitously or conditionally. He thinks Mr. Adams admits this. Still, favored nation is favored nation, whether the favor is gratuitous or conditional, and France is entitled to both kinds of favor, because: "1st. There are two modes of being treated upon the footing of the most favored nations, either gratuitously or conditionally. 2d. That the

[1] Am. State Papers, F. R. vol. V, pp. 163–164.

ships of four nations enjoy at this time in the United States, and of course in the ports of Louisiana, the rights and privileges of the most favored nation. 3d. That France, according to the terms of the eighth article of the Louisiana treaty, has a right to be put in possession of the same privilege in these said ports, being part of the United States. 4th. That she owes, and can owe no reciprocity, not only because no such condition is stipulated in the contract, but also because the privilege in question is a right of property reserved, or if you prefer it so, is one of the equivalents of the bargain. 5th. That the intention of the negotiators cannot be doubtful, since the article, which in itself requires no explanation, has, as a corollary, an authentic document which would irresistibly prove, by the very circumstances of the case, what was meant and intended, if the treaty itself had not expressed it in the most explicit terms." [1]

Mr. Adams to Mr. Gallatin, August 24, 1820: "The pretense is, that by the eighth article of the Louisiana treaty, French vessels are to be forever treated in that province on the footing of the most favored nation; and, on the strength of this, they claim to be admitted there, paying no higher duties than English vessels. Our answer is, that the English pay there no higher or other duties than our own, not by *favor*, but by bargain. England gives us an equivalent for this privilege; and a merchant might as well claim of another, on the score of equal favor, that he should give a bag of cotton or a hogshead of tobacco to *him*, because he had sold the same articles to a third, as France can claim as gratuitous to her that it has been granted for valuable considerations to Great Britain."

Mr. Gallatin to Mr. Adams, September 19, 1820. The qualifying words in the clause which were, "inserted for

[1] Am. State Papers, F. R. vol. V, p. 646.

greater caution, define what was meant by that stipulation, and if any inference was to be drawn from them, it would be, that the two nations had in their first treaty thought proper to state explicitly what they intended by the clause; . . . and that this explanation having once been given, the same construction must ever after be given to clauses of a similar nature, without it being necessary to repeat these explanatory words, and they have accordingly been admitted in every subsequent commercial arrangements between the two countries. . . . But these words are mere surplusage. The clause would have exactly the same meaning without as with them, and their omission in an article cannot . . . alter the only construction of which that article is susceptible. . . . "We might be compelled, by an unsuccessful war, or induced by political considerations, to grant some gratuitous favor to a third nation; and France would, in that case, immediately participate gratuitously in Louisiana, in the same favor, though we had no motive in granting it to her. The article did confer substantial and permanent advantages on her, without recurring to the construction for which she contends." [1]

Mr. Gallatin learned in Paris that the French Government refused to separate in the negotiation (French Spoliation Claims) the question relative to the Louisiana Treaty from that of discriminating duties, less with a view to insist "on their construction of the treaty, than from the hope that the United States would make concessions in some other respect, in order to obtain from France a relinquishment of her pretensions under the article in question" and says that it was suggested to him that a prolongation of special privileges of article seven be granted France to overcome the difficulties.[2]

[1] Am. State Papers, F. R. vol. V, pp. 647-8.
[2] Am. State Papers, F. R. vol. V, p. 649.

France insisted upon combining the question of the interpretation of the 8th article of the Louisiana treaty with the indemnity or spoliation claims, and refused to separate the issues.[1]

Mr. Adams contended that the question relating to the 8th article of the Louisiana treaty was of such a different nature that it could not be blended with that of indemnity for individual claims, without a sacrifice on the part of the United States of a principle of right.

"The negotiation for indemnity presupposes that wrong has been done; that indemnity ought to be made; and the object of any treaty stipulation concerning it, can only be to ascertain what is justly due, and to make provision for the payment of it. . . . The United States, asking reparation for admitted wrongs are told that France will not discuss it with them, unless they will first renounce their own sense of right, to admit and discuss with it a claim, the *justice* of which they have constantly denied."

"But where the disposition to redress wrongs does not exist the means of evasion and procrastination will never be wanted. We can regard in no other light the claim brought forward by France under the eighth article of the Louisiana treaty."[2]

"It is only by losing sight of the words of the treaty by means of desultory discussion upon abstract points that the truth of our construction can be for a moment obscured."[3]

One of the French negotiators[4] in his history of the negotiation, said: "The negotiation had three objects,

[1] Mr. Gallatin to Mr. J. Q. Adams, Am. State Papers, F. R. vol. V, p. 670. Mr. Adams, Sec. of State to Mr. Brown, Aug. 14, 1824, Ho. Ex. Doc. 147, 22d Con. 2d. Sess.

[2] Mr. Clay to Mr. Brown, Ho. Ex. Doc. 147, 22d Con. 2d Session.

[3] Mr. Van Buren to Mr. Rives, *Ibid.*

[4] Barbé Marbois.

the session, the price and the indemnities claimed by the United States; and that it was agreed to treat of these objects *separately* and to make of them three *distinct* acts or treaties."[1]

Both parties refused to arbitrate the question, but in 1831 France abandoned her contention, receiving as compensation a reduction in the duties on her wines and brandies provided for in the Convention of that date.

This correspondence with France, extending over a period of fourteen years, settled for all time as regards that Power that the law of treaties is, that favors are never to be granted, unless the equivalent is forthcoming, for, setting aside the Treaty of 1831, where France abandoned her claim, whether for renumeration or not, in every case where there is correspondence, she was inevitably driven to maintain, not that an equivalent or consideration was not required to secure a favor, but that it had already been given; that the session of Louisiana was the equivalent, and this having been granted, she demanded the favor.

In the debates in the French Chamber of Deputies on the bill appropriating the amount awarded to the United States in settlement of the French Spoilation claims, the question of the rights of France under the eighth article of the Louisiana treaty came up, and while the statements of the Ministers were of such a nature as to conciliate the Deputies, the right of the contention of the United States seems to have been admitted.[2]

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[1] Mr. Rives to Prince de Polignac, Ho. Ex. Doc. 147, 22d Con. 2d Session.
[2] Ho. Ex. Doc. 2, 23d Con. 1st Session.

CHAPTER IV.

The intention of the clause is that its provision shall be self-executing, that is to say, that any gratuitous favor granted by one State to another is immediately secured to the nations enjoying the privileges of the clause, as though the favor had been expressly granted to them simultaneous with the original grant or favor. When, however, the concession has been made on a basis of reciprocity, and the equivalent of the consideration secured for it has been conceded, prior to the grant, by another State entitled to favored nation treatment, either by its general laws or by treaty, the question arises as to whether or not some formal notice on the part of the State entitled to the favor is required as a condition precedent to the operation of the clause. The right to the favor is undisputed, and the equivalent has already been granted. Where the concession involves a reduction of duties on imports, tonnage tax, or like charges, it would seem that no notice is necessary.[1] When, on the other hand, it relates to civil

[1] Provisions of the 9th article of the treaty with the Hanseatic Republics of December 20, 1827, together with the provisions of the 4th article of the treaty with Belgium of July 17, 1858, considered with reference to the question whether the North-German Steamship Co. is entitled to a refund of the tonnage tax collected in ports of the United States on that company's steamers whose home port is Bremen; and held, upon the facts presented, that the steam vessels of Bremen plying regularly between that port and the United States have, during the entire period subsequent to the date of the ratification of said treaty with Belgium, been exempt from such tax in American ports by force of the 9th article of said treaty with the Hanseatic Republics, *held*, also, that where the tax has been exacted and collected from such vessels in American ports, at any time within that period, it should be refunded.

rights, jurisdiction, extradition, patents, trade-marks or copyrights, all of which look to the courts of justice for their protection, it would seem a better plan to record the right by some formal instrument.[1] Its necessity will be largely determined by the legal requirements of the laws of the country conceding the favor, and the nature of the instrument by which the original concession was made.

It has been urged that the use of the phrase "shall immediately be enjoyed" places the clause in the category of the imperative form, and secures any favor whatever in the subjects of which it treats gratuitously and without condition. Unless supported by some other strong

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Bremen had been conceding the exemption. The Attorney General said: "Now, Bremen was not a party to the treaty with Belgium and was not necessarily cognizant of the provisions thereof of which she was collaterally interested; but the United States had that knowledge, and if formal notice from either the United States or Bremen of the provision aforesaid, and of compliance therewith, was necessary, it would seem that notice should have been first given by the United States to Bremen. The Government of Bremen would then, probably, have answered, giving the facts and the assurances contained in the paper above quoted. However this may be, when the essential fact is unquestioned, (which could not have escaped the knowledge of the United States) that Bremen has all along been conceding the exemption, it hardly comports with that scrupulous regard for the obligation of treaties which this nation has always cherished, to stand upon a point so technical, not to say so trivial as that of the want of formal notice from Bremen. The condition having been fully performed on her part, her regular steam navigation is entitled to reciprocal performance in the ports of the United States." Treaties and Conventions between the United States and other Powers, edition, 1889, page 1277. Quotation from 14 Op. At. Gen. 530, Williams.

[1] "This theory was further exemplified and given practical application under the commercial arrangements concluded with foreign Powers pursuant to section III of the tariff Act of 1890. It may possibly be as you conjectured, that American citizens are, 'subject to the same terms and conditions,' entitled to the same privileges and protection in regard to trade marks and patents that the new Japanese-German treaty secures to German subjects in Japan, but the Department is compelled to think it at least doubtful. But even supposing your view to be correct, it is not perceived how it could be declared that the conditions exist except by a treaty, convention, or law. . . ." Mr. Olney to Mr. Dun, U. S. For. Rel. 1896, p. 429.

evidence, the claim cannot be sustained. "Immediately" refers to the self-executing nature of the clause and not to the conditions of enjoyment. It is true that article 10 of the Treaty of 1850 between the Swiss Confederation and the United States, which contains this phrase, was interpreted as being of the imperative form, and on that account probably was denounced by the United States in 1900; but this interpretation was induced by the articles preceding and following article 10, as well as by the fact that, in an exchange of notes between the plenipotentiaries of the two countries who negotiated the treaty, the agent of the United States agreed that this was the understanding of his Government.

The clause embodying the phrase "without any consultation or delay" lies in the doubtful ground between the simple and the imperative form. It is found in article 9 of the Treaty of 1857 between the United States and Japan. The article is unilateral, and secures favored nation treatment for the United States alone. The Department of State during the life of the treaty inclined to the opinion that it did not refer to favors based upon reciprocity.[1]

To secure beyond question the interpretation of an imperative and unconditional clause, it is essential that it contain the words "unconditionally," "without equivalents," or the like.

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[1] In reply to Mr. Dun's inquiry as to whether or not a favor in patents, trade-marks and designs, granted to Germany by treaty might be claimed under article nine of treaty of March 31, 1854, Mr. Olney said: "It reads as follows: 'It is agreed that if at any future day, the Government of Japan shall grant to any other nation or nations privileges and advantages which are not herein granted to the United States and to the citizens thereof, that these same privileges and advantages shall be granted likewise to the United States and citizens thereof, without any consultation or delay.' . . . I may remark that, in the Department's judgment, the provision of the treaty of 1854, to which you refer, does not mean if Japan shall grant privileges to Germany in consideration of similar privileges granted by the latter to

The right, privilege, favor, or immunity secured through the operations of the most favored nation clause is subject to all the limitations imposed upon the original grant or concession. Upon the lapse of the latter through the abrogation or expiration of the instrument creating it, or upon a repeal of the law by which the favor is granted, the benefits secured by the operation of the clause are likewise terminated. They are off-shoots of the original concession as the parent stem and in their effect are subordinated to it. Prof. Ernest Lehr, in an interesting article on the most favored nation clause,[1] inclines to the opinion that a right claimed and secured under the most favored nation clause becomes a right distinct and separate from the original grant, to be enjoyed, not during the life of the original concession, but during the life of the treaty or convention containing the favored nation clause. That if A granted to B, in a convention limited by its own terms to the life of one year, the right to its coasting trade, C, upon formal notice given, might, by the operation of the most favored nation clause, secure

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the former, the same privileges shall be granted gratuitously to the United States. The clause 'That the same privileges . . . or delay,' only refers, in my opinion, to privileges granted gratuitously to a third Power, and not to privileges granted in consideration of concessions made by another Government." Quotes Wharton's Int. L. D. vol. II, sec. 134, p. 39, U. S. For. Rel. 1896, p. 429.

[1] "Il faut tout d' abord, croyons-nous, faire abstraction du cas on la tierce puissance, sans se borner à se mettre au bénefice de la clause, a expressement pris acte de la concession, au moment ou elle entendait s' en prévaloir, et ou cette circonstance a fait l' object, soit d' une déclaration officielle addressée par elle à la puissance concédante et laissée par celle-ci sans réponse ni contestation, soit, à plus forte raison, d'un échange de correspondances entre les deux gouvernements. Dans ce cas, bien qu' obtenue dans le principe grâce à la clause de la nation la plus favorisée, est devenue partie intégrante au droit conventionnel des deux puissance, et elle cesse de dépendre des relations qui peuvent entre la puissance qui y a consenti et celle qui l' avait obtenue la premiere: la bouture, si l' on vent nous permettre cette comparaison, est devenue une plante séparée dont la vie n' est plus subordonnée à celle du tronc primitif." Prof. Lehr, "La Clause de la Nation la plus Favorisée," Rev. Dip. Int. 1893, p. 313.

the enjoyment of the right to this coasting trade for a period of twenty years,—such time being that fixed for the duration of the treaty between A and C. It is true that Prof. Lehr lays stress upon the formal nature of the notice to be given by C, and he implies that it be tacitly accepted by A. However this may be, the doctrine seems erroneous; it would not be obtaining the benefits of the original grant, but securing a new and greater favor, and would make C more favored than the most favored nation. To accomplish this it would be necessary that there be a complete understanding between A and C as expressed in an exchange of notes duly authorized and confirmed, which would amount in fact to a formal convention. The right to the favor is contingent, terminating with the life of the original grant, and it was so decided in the determination of questions arising through the operation of article 4 of the Treaty of 1858, between the United States and Belgium. By the terms of this article, steam vessels of Belgium were exempted in ports of the United States from the payment of duties of tonnage, anchorage, buoys and lighthouses, from which duties United States vessels in their home ports were not exempt. Other nations claimed and were granted like privileges for their vessels as those enjoyed by Belgian ships, by virtue of the favored nation clauses in their treaties with the United States. The latter country, acting within her treaty rights, on July 1, 1875, gave notice to Belgium of the abrogation of the treaty, and, upon the expiration of the rights hitherto enjoyed by Belgian vessels, those secured by the favored nation clauses to vessels of other countries likewise expired.

This rule does not apply to vested rights and interests. The abrogation, suspension or termination of a treaty or any part of it, by which these vested rights were secured, will in no wise impair or destroy them. These rights are

such as "are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character." "Between property rights, not affected by the termination or abrogation of the treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hope." [1]

When there is withheld from a nation, or its citizens or subjects any privilege, favor, or immunity to which by the operation of the favored nation clause, it or they are entitled, a claim for damages, if actual damages have been suffered, is not barred by the statute of limitations, on the theory that "where a treaty is made between two independent powers, its stipulations cannot be deferred, modified or impaired by the action of one party without

[1] "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. Thus in the *Head Money Cases*, the Court speaks of certain rights being in some instances conferred upon the citizens or subjects of one nation residing in the territorial limits of the other, which are 'capable of enforcement as between private parties in the Courts of the country.' 'An illustration of this character,' it adds, 'is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by dissent and inheritance, when the individuals concerned are alien.' 112 U. S. 580, 598. The passage cited by counsel from the language from Mr. Justice Washington in *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 493, also illustrates this doctrine. There the learned Justice observes that 'if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it.' Of this doctrine there can be no question in this Court; but far different is this case where a continued suspension of an exercise of a Government power is insisted upon as a right, because by the favor and consent of the Government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights, not affected by the termination or abrogation of a treaty, and expectations of benefit from the continuance of existing legislation, there is as wide a difference as between realization and hope." *Chinese Exclusion Case*, 130 U. S. p. 581.

the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the prosecution of any claim under a treaty made by them, then neither country can interpose such limit.[1]"

If the discrimination has taken the form of an actual money tax or loss of property, the claim for restitution will rightly carry with it interest upon the amount unjustly levied when such tax has been paid under protest.

It may happen that a State, either by its Constitution or the fundamental rules determining the weight to be given to laws and treaties, places treaty stipulations and legislative acts upon the same level, the one of latest date repealing others in conflict with it. Under this theory of law the legislature may pass an act which denies to another nation a right which is guaranteed to it either by direct stipulation, or by the operations of the most favored nation clause.[2] The courts, following the constitutional

[1] Report of Decisions of Commission of Claims under Convention of Feb. 8, 1853, between the United States and Great Britain, pp. 305–310. Sen. Ex. Doc., 34th Con. See also notes pp. 63 and 71.

[2] "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provision on the interest and honor of the Governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the Judicial Courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties and the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'This Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is the law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to

or fundamental rules, are obliged to sustain the constitutionality of the discriminating law and an appeal to them to confirm the right is futile. The fact that the State considers a legislative enactment paramount to treaty stipulations of earlier date with which it is in conflict, does not, according to the law of nations, weaken the treaty obligation of the nation. There may be no redress granted by the courts, the discriminating law may be constitutional, but the state remains in honor bound to carry out the stipulations of its formal convention. Treaties are the solemn compacts by which nations register their consent to the rules which shall govern their intercourse, and a breach in the obligations prescribed which depend for their enforcement renders the State committing it liable in international law and in equity to the injured party.

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be enforced in the Court of Justice, that Court resorts to the treaty for a rule of decision for the case before it as it would to a Statute.

"But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an Act of Congress in this respect, which may be repealed or modified by an act of later date, nor is there anything in its essential character, or in the branches of the Government by which the treaty is made, which gives us this superior sanctity. . . .

"In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the Courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." *Head Money Cases*, 112 U. S. p. 508. Same decision in *Taylor* v. *Morton*, 2 Curtis, 454; *Ah Lung*, 18 Fed. Rep. 28; *Ropes* v. *Clinch*, 8 Blatchford, 304; *Clinton Bridge Case*, Woolworth, 150, 156; *Bartram* v. *Robertson*, 15 Fed. Rep. 212.

CHAPTER V.

A privilege, favor or immunity granted by one nation to another in matters of navigation and commerce takes the form of an amelioration of the conditions governing navigation and commerce and is enjoyed by a State, not as a political entity but through the individuals who compose it. It lessens taxes upon individuals, their vessels and their goods, opens ports to their commerce, and gives them greater freedom and protection in the conduct of their commercial affairs. In the most favored nation clause the words "nation" and "citizens, subjects and inhabitants of a nation" are intended to be synonymous.

Viewed from the standpoint of international law, a citizen or subject of a nation occupies a dual position. The country to which he owes a permanent allegiance will protect him during his sojourn or domicile in a foreign country in all the rights, privileges and immunities which it has secured for its citizens and subjects by treaty. In the sense of a foreign merchant temporarily domiciled in a foreign land, his native country obtains for him the best possible terms upon which he may reside there, transact business, import goods, dispatch his vessels, etc. He is looked upon as a citizen or subject of the country to which he owes permanent allegiance and through whose interference he derives his rights.

On the other hand, a person domiciled in a foreign country and there engaged in commerce is, in the eyes of the commercial world, a citizen or subject of that country and during his residence there he follows its character in peace and war. He owes an allegiance to its sovereign,

temporary it is true, and liable to be terminated at any time, but sufficient to establish his character as a citizen or subject of the country for the purposes of commerce.[1] In other words, a treaty may prescribe the terms upon which a citizen or subject of one of the contracting powers may, for the purposes of commerce, become a temporary citizen, subject or inhabitant of the other contracting party; and, in the sight of all other nations, a person so domiciled in a foreign country and there engaged in commerce is for that purpose deemed a subject of that nation.[2] Thus a French citizen, under the terms of a

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[1] "As to the second objection, it assumed, as its basis, that the terms 'subjects,' as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish Government. It is, in our opinion, very clear, that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to effectuate this object, the term 'subjects,' when applied to persons owing allegiance to Spain, must be construed in the same sense as the term 'citizen,' or 'inhabitants,' when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this construction is, that in the 18th article of the treaty, the terms 'subjects,' 'people' and 'inhabitants' are indiscriminately used as synonymous, to designate the same persons in both countries, and in cases obviously within the scope of the preceding article. Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance; but so fixed that as to all other nations, he follows the character of that country in war as well as in peace. The mischiefs of a different construction would be very great, for it might then be contended, that ships owned by Spanish subjects could be protected by that treaty although they were domiciled in a foreign country, with which we were at war; and yet the law of nations would, in such a predicament, pronounce them enemies. We should, therefore, have no hesitation in overruling this objection." *The Pizarro*, 2 Wheaton, p. 227.

[2] A Spanish subject who came to the United States, in time of peace between Spain and Great Britain, to carry on a trade between this country and the Spanish provinces, under a royal Spanish license and who continued to reside here, and carry on that trade, after the breaking out of war between Great Britain and Spain, is to be considered as an American merchant, although the trade could be lawfully carried on by a Spanish sub-

treaty between France and Spain establishes himself in a Spanish port and there engages in the foreign trade between Spain and Great Britain. For the purposes of commerce his domicile in Spain establishes his nationality as Spanish, and he is entitled to receive at the hands of the British authorities every privilege, favor or immunity that is extended to Spanish subjects. France and Spain determine the conditions upon which he resides and engages in foreign commerce in Spain; and Spain and Great Britain arrange the terms upon which the commerce between them, in which he participates, is to be conducted.

Personal property is supposed to follow the owner; its character, as a rule, depends upon his domicile, and, in case of war, the domicile might determine whether the property was hostile or friendly according to the condition of the country in which the owner resides. This is not true, however, of products of the soil. Land is fixed, and, wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. The proprietor partakes of the character of the land, and the produce of it, whoever the

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ject only. The national commercial character of a person is to be decided by his domicile, and not by the nature of his trade. *Livingston and Gilchrist* v. *Maryland Ins. Co.*, 7 Cranch, p. 506.

The native character does not revert, by a mere return to his native country, of a merchant who is domiciled in a neutral country, at the time of capture; who afterwards leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country. Under these circumstances, the neutral domicile still continues. *The Friendschaft*, 3 Wheaton, page 14.

British subjects, resident in Portugal (though entitled to great privileges) do not retain their native character, but acquire that of the country where they reside and carry on trade. *Ibid.*

Summary of cases, both British and American, on the proposition that domicile determines nationality for purpose of trade, is given in appendix of 2 Wheaton, pages 27, 28, 29.

owner may be, is subject to the same disabilities as the land itself.[1]

In general terms, a State secures by treaty the right for its citizens or subjects to reside under certain conditions in foreign countries and there engage in the latter's commerce, and provides that its own foreign commerce promoted by its citizens, subjects and inhabitants (all persons resident within its borders) shall receive from other countries the most favorable terms. A treaty of commerce has two objects, first, to obtain rights for its citizens or subjects abroad and, second, to promote the foreign commerce of the State.

The terms citizens, subjects and inhabitants, which are indiscriminately used as synonymous, apply only to natural persons, who, as members of the body politic, owe a permanent or temporary allegiance to the State. They do not include artificial persons created by legislature known as corporations. It is a well settled rule of law that a corporation can have no legal existence out of the boundaries of the State by which it is created. "It exists only in contemplation of the law and by force of the law; and where the law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."[2] They are not included

[1] "Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed; wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offense to the course of human opinion, to say, that the proprietor so far as affects his interests in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities." *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch, p. 191.

[2] A state statute which enacts that no insurance company not incorporated under the laws of the State passing the Statute, shall carry on its business within the State, without previously obtaining a license for that purpose (license only obtained on deposit of bonds) . . . is not in

in the favored nation clause and their recognition abroad

conflict with that clause of the Constitution of the United States which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," nor with the clause which declares that Congress shall have the power "to regulate commerce with foreign nations and among the several States."

Corporations are not citizens within the meaning of the first of these clauses. They are creatures of local law, and have not even an absolute right of recognition in other States, but depend for that and the enforcement of their contract upon the assent of those States, which may be given accordingly on such terms as they please . . .

The issuing of a policy of insurance is not a transaction of commerce, . . . but is a simple contract of indemnity against loss.

"We proceed to the second objection urged to the validity of the Virginia Statute, which is founded on the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the World was carried on by corporations. The East India Company, the Hudson Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations.

"There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the insured, for a consideration paid by the latter. The contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not Inter-State transactions though the parties may be domiciled in different States. The policies do not take effect . . . are not executed contracts . . . until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Vir-

must be secured specifically by treaty.[1] If a corporation is to exercise its powers outside of the jurisdiction of the sovereignty which has created it, it can only do so by the consent and comity of the foreign State into whose jurisdiction it goes. In the first place the charter of the corporation must show its power to transact business in a foreign country, and, in the second place, the foreign country may impose such restrictions as it wishes upon its business transactions.

Where, however, the business of a corporation is strictly commerce, comity, or the voluntary law of nations, following long established custom and founded in reciprocal advantage, provides for its recognition, and gives assent to the enforcement of purely commercial contracts whether made by individuals, partnerships, associations or corporations.[2]

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ginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

"In *Nathan* v. *Louisiana* (8 Howard, page 73), this Court held that a law of that State imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the Constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the Court, "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on." And the opinion shows that, although instruments of commerce, they are subjects of State regulation, and, inferentially, that they may be subjects of direct State taxation. *Paul* v. *Virginia*, 8 Wall. p. 181.

[1] Corporations are not included in favored nation clause. A foreign corporation has no status outside the country of its creation; its recognition abroad must be secured by treaty. Mr. Evarts to Mr. Hitt (France) For. Rel. 1880, p. 355. Also Mr. Evarts to Mr. Outray (French Minister), U. S. For. Rel. 1880, p. 384.

Greece refused to recognize joint stock companies (corporations) of the United States under article 1 of treaty. Legal status is determined by reciprocal arrangement. Mr. Fearn to Mr. Blaine, U. S. For. Rel. 1889, p. 480. Assented to by the Department of State. Mr. Adee to Mr. Fearn, *Ibid*, p. 481.

[2] "It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in

While the commerce of corporations like that of individuals is universally recognized and accepted by for-

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contemplation of the law, and by force of the law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow, that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible, and intangible; yet it is a person for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court. . . . Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract, within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

"The corporation must, no doubt, show, that the law of its creation gave it authority to make such contract, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person in the State of its creation is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place, to exercise there the powers with which it is endowed.

"Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And that brings us to the question which has been so elaborately discussed, whether, by the comity of nations and between these States the corporations of one State are permitted to make contracts in another. It is needless to enumerate here the instances in which by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another. Where the rights of individuals are concerned, the cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible, when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that Courts of Justice have continually acted upon it, as a part of

eign States, it should be borne in mind that all the rights which they enjoy in the absence of express stipulation flow, not from the commercial clause of a treaty, but from comity. The long observance of this custom has given it the force of a treaty obligation, but it in no way impairs the general rule that a corporation is neither a citizen, subject nor inhabitant in the treaty sense.

Mr. Jefferson in his instructions to the Commissioners to Spain who were to negotiate for the free navigation of the Mississippi River enunciated the doctrine that the terms of *Gentis Amicissimae* have in view only existing nations and not those that may spring up in the future,[1]

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the voluntary laws of nations. . . . Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can see no sufficient reason for excluding them when they are not contrary to the knowu policy of the State or injurious to its interests."

The rule is accepted in England and we have adopted our general principles of jurisprudence from that country. *Bank of Augusta* v. *Earle*, 13 Peters, p. 519.

[1] "It will probably be urged, because it was urged on a former occasion, that if Spain *grants* to us the right of navigating the Mississippi, other nations will become entitled to it by virtue of treaties giving them the rights of the most favored nation. Two answers may be given to this: When those treaties were made, no nations could be under contemplation, but those then existing, or those at most who might exist under similar circumstances. America did not then exist as a nation; and the circumstances of her position and commerce are so totally dissimilar to everything then known, that the treaties of that day were not adapted to any such being. They would better fit even China than America; because, as a manufacturing nation, China resembles Europe more. When we solicited France to admit our whale oils into her ports, though she had excluded all foreign whale oils, her Minister made the objection now under consideration, and the foregoing answer was given. It was found to be solid, and the whale oils of the United States are in consequence admitted though those of Portugal and the Hanse Towns, and of all other nations are excluded. Again, when France and England were negotiating the late treaty of commerce, the great dissimilitude of our commerce (which furnishes raw materials to employ the industry of others, in exchange for articles where industry has been exhausted) from the commerce of European nations (which furnished things ready wrought only) was suggested to the attention of both negotiators, and that they should keep their nations free to make peculiar arrangements with ours, by communicating to each other,

which has since been adopted by several writers.[1] It is extremely doubtful if Mr. Jefferson's proposition could be sustained. He himself, as shown in his report to the President, seems of this opinion, for he lays great stress upon the equivalents which the United States had already extended to Spain. It could hardly be supposed that if, through some unforeseen cause, a new nation were created in Western Europe which should secure for its commerce unusual favors from one of the Western Powers, that the latter would not be obliged upon terms of reciprocity to extend the like privilige to nations enjoying the privileges of the most favored nation clause. Such arguments as remoteness or dissimilarity of commerce which might have been used to advantage a century ago have disappeared, owing to the greatly increased facilities of commercial intercourse.

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only the rights of the most favored European Nation. Each was separately sensible of the importance of the distinction; and as soon as it was proposed by the one, it was acceeded to by the other, and the word *European* was inserted in their treaty." (Jefferson turns the argument against himself.) "It may fairly be considered then as the rational and received interpretation of the diplomatic terms of *gentis amicissimae*, that it has not in view a nation unknown in many cases at the time of using the terms, and so dissimilar in all cases as to furnish no ground of just reclamation to any nation." The report of Mr. Jefferson to the President on substance of instructions to Commissioners to Spain. Am. State Papers. F. R. vol. I, p. 253.

"In the second place, we have a claim on Spain for indemnification for nine years; exclusion from that navigation, and a reimbursement of the heavy duties levied on commodities she has permitted to pass to New Orleans. The relinquishment of this will be no unworthy equivalent." *Ibid*, p. 255.

[1]This favored nation concession has in view only existing nations, and not what may spring up in the future. Bowen, Int. Law, sec. 99. Also Wharton, Int. L. Dig. sec. 134.

CHAPTER V.

The most favored nation clause deals with favors in foreign commerce and navigation, and for its proper understanding it is necessary to inquire into the meaning of these terms. Commerce between foreign nations means commerce between them as carried on through their citizens, subjects and inhabitants respectively. It consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures. It is traffic, but not traffic alone; for it embraces commercial intercourse, which it describes between nations and parts of nations in all its branches; and it is regulated by prescribing rules for carrying on that intercourse.[1] Strictly

[1] (Chief Justice Marshall.) "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The Counsel for the Appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects to one of its significations. Commerce, undoubtedly is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter. If commerce does not include navigation, the Government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the Government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands and has uniformly understood the

considered, foreign commerce consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. Its transactions have been aptly described as having their beginning in the departure of persons or property from a foreign country, and ending only when those persons become mingled with the common inhabitants, and when the property becomes mingled with the mass of other property of the State to which they are severally brought; and any impediment to these transactions is an impediment to commerce.[2]

Articles of commerce are the subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are commodities shipped and forwarded from one State to another and then put up for sale. But the broad term "commerce" covers more than the mere commodities; it embraces its agents and instruments. The former are the persons through whose efforts traffic and intercourse are effected, as the merchant engaged in foreign trade, the importer, the exporter, and the furnisher of means of transportation; and the latter are, primarily, the means of conveyance or intercourse, namely: the ship, the railroad or other common carrier, and, secondarily money, the bill of exchange, the bill of lading, the post, the telegraph, and the telephone. The right to engage in foreign commerce carries with it not only a license to import, export, buy, sell and exchange the articles of

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word 'commerce' to comprehend navigation." *Gibbons* v. *Ogden*, 9 Wheaton, 190, 191.

"Commerce consists in selling the superfluity in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." *Passenger Cases*, 7 Howard, p. 416.

[2] By Mr. Lord in his argument in the *Head Money Cases*, 112 U. S. p. 508.

commerce, but authorizes the agents to use its instruments on fair and equal terms. So, therefore, a tax or charge may be made upon commerce either directly by a duty upon the articles, or indirectly by a tax upon its agents or instruments.

In the consideration of questions of foreign commerce, care must be taken to distinguish between the instrument of commerce and the dealer in, or furnisher of the instrument. The ship and the bill of exchange are instruments of commerce, but that fact does not make the ship builder or the banker a merchant engaged in foreign trade, any more than it would a manufacturer of agricultural machines, because a part of his products eventually become articles of commerce and are shipped abroad for sale. The test for the individual remains—Is his business that of importing for sale or barter, or exporting, or transporting articles of commerce arriving from or going abroad? The rule excludes bankers, exchange brokers,[1] insurance companies and agents,[2] and all persons whose

[1] "But we are of opinion, that, under the clause of the constitution giving power to Congress 'to regulate commerce with foreign nations, and among the several States,' Congress possesses the power to punish offenses of the sort which are enumerated in the 9th section of the act of 1825, now under consideration. The power to regulate commerce includes the power to regulate navigation, as connected with the commerce with foreign nations and among the States. It was so held and decided by this Court, after the most deliberate consideration, in the case of *Gibbons* v. *Ogden*, 9 Wheaton, 189 – 198. It does not stop at the mere boundary line of a State; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts, done on land, which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among States." *United States* v. *Coombs*, 12 Peters, p. 72.

[2] "As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange, and upon this ground it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

"What is there in the products of agriculture, of mechanical ingenuity, of

business may be that of buying and selling the instruments of commerce, just as it would persons engaged in any other enterprise. They are employed in dealing in what may become the *instruments*, not in the *articles* of commerce, and any rights or privileges enjoyed by them depend upon domestic law, comity, or some specific provision of treaty, and cannot flow from a clause providing for favors in commerce and navigation.

The test to be applied to articles of commerce is: Are they articles having an existence and value independent of the parties to them? Are they, as exports, identified as separated from the general mass of property of the State, and, as such, in the hands of the common carrier? Or, identified as imports, are they as yet unabsorbed into and unmingled with the common mass of property? An affirmative answer to these questions establishes their identity as such.

The determining factor for instruments of commerce is necessity. It is not sufficient that a thing merely aids

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manufactures, which may not become the means of commerce? And is the vendor of these products exempted from State taxation, because they are thus used? Is a tax upon a ship as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship building, the same as the exercise of any other mechanical art? and also the traffic of ship-chandlers and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business, within the State, on the ground that the products sold may be used in commerce.

"No State can tax an export or an import as such, except under the limitation of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business by the way of license, although he may buy and sell cotton for foreign exportations.

"A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable. . . .

or facilitates commerce; it must, in the light of surrounding conditions, be a necessity. These necessities keep pace with the progress of civilization, and what is not a necessity to-day may become so to-morrow through some invention in the mechanical arts. The sailboat has developed into the steamer, the wagon into the railroad, the messenger into the post, the telegraph and the telephone; "as the new agencies are successfully brought into use to meet the demand of increasing population and wealth."[1]

While the ownership or leasehold of land is of advantage to the foreign merchant in the transaction of his business, neither can rightly be claimed on the ground that it is included in the term "commerce." Land is not a commodity to be transported to a foreign country, which, separated from the mass of property of a State, can become an export; nor is it a necessary instrument of commerce. It is fixed, and any contract for its sale or lease is to be enforced within the jurisdiction where the land is situated. Comity, perhaps, may grant to all foreigners where it grants to one, but rights in real estate cannot be found in rights of commerce.

"He (the bill broker) is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship builder without whose labor foreign commerce could not be carried on." *Nathan* v. *Louisiana*, 8 Howard, 73.

[1] "Since the case of *Gibbons* v. *Ogden*, 9 Wheaton, 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Postoffices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the Postal service are placed within the power of Congress, because, being national in their operations, they should be under the protecting care of the national Government.

"The powers thus granted are not confined to the instruments of commerce, or the Postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new development of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and

In *Paul* v. *Virginia*[1] the Supreme Court of the United States held that the business of insurance was not commerce, nor the issuing of a policy of insurance a transaction of commerce; that the policies do not take effect—are not executed contracts—until delivered by the local agent; and that they are then local transactions to be governed by local laws. The policy itself if it be marine insurance and covers the goods in transit, may be an instrument of commerce, but the issuer is not on that account engaged in commerce. On this principle it has been held by the same Court that banking or dealing in foreign bills of exchange is not commerce; it is in dealing in the instruments of commerce, not in its articles.

A number of instances have occurred where protection has been claimed under the most favored nation clause securing favors in commerce and navigation for patents, designs and trade-marks.[2] Concerning the first two the writer has no hesitancy in saying that they are not articles or instruments of commerce.[3] Monopolies in the manufacture of a patented article, or in the printing of designs are not granted by a State as instruments of commerce to facilitate directly international trade; they are intended to encourage inventive genius and are a reward to the inventor for his achievement and for the time and labor expended. The trade-mark, on the other hand, does not give any monopoly in the manufacture or sale of a particular class of goods. Its object is to point distinctively to the origin or ownership of the merchandise

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from the railroads to the telegraph, as these new agencies are successively brought into use to meet the demand of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances." *Pensacola Tel. Co. v. Western etc., Tel. Co.*, 96 U. S. p. 1.

[1] 8 Wall. p. 181.

[2] Great Britain and other Powers sought such favors from Japan in 1896.

[3] *Trade Mark Cases*, 100 U. S. S. C. p. 82.

to which it is applied.[1] A manufacturer gaining a market for a certain class of goods, attaches to them a simple and perhaps attractive device by which they become known in the market, more widely perhaps than by the name of the maker; but is not the object of the mark to identify the goods in a simpler and more attractive manner than by the use of the maker's name? An opinion of the Supreme Court of the United States, while it left this question undecided, touched the point, and, from its comments, it would appear that the trade-mark is neither an article nor an instrument of commerce.[2] In 1895, Mr. Alexander, the United States Minister to Greece was instructed and authorized to negotiate with that country a trade-mark convention, and, finding that the neces-

[1] "Hence the trade-mark must either by itself, or by association, point distinctively to the origin or ownership of articles to which it is applied." *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. p. 537.

[2] The Attorney General's argument in the *Trade Mark Cases* was:

"2. Trade marks are important instrumentalities, aids or appliances, by which trade, especially in modern times, is conducted. They are the means by which manufacturers and merchants identify their manufactures and merchandise. They are the symbols by which men engaged in trade and manufacture become known in the marts of commerce, by which their reputation and that of their goods are extended and published; and as they have become better known, the profits of their business are enhanced. Hence, the use of trade marks has become universal, and in all trades and business of any extent they are necessary auxiliaries."

The opinion of the Court gave no direct answer to the above proposition, as the question was not pertinent to the issue; but what was said is important.

"Any attempt, however, to identify the essential characteristic of a trade mark with inventions and discoveries in arts and sciences or with the writings of authors will show that the effort is surrounded with insurmountable difficulties. . . .

"The other clause of the constitution supposed to confer the requisite authority on Congress is the third of the same section, which, read in connection with granting clause, is as follows: 'The Congress shall have the power to regulate commerce with the foreign nations and among the several States, and with the Indian Tribes.'"

"The argument is that the use of a trade mark—that which, alone gives it any value—is to identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce;

sity for the ratification of so formal an instrument might defeat it, (the legislature opposing it,) signed with the Minister of Foreign Affairs, a declaration to the effect that the treaty of commerce and navigation of December 10, 1837, conferred upon the citizens or subjects of either country in the dominions of the other the same right with respect to trade-marks, industrial designs and patterns, as such citizens and subjects enjoyed in their own country. Great Britain and other powers had previously signed declarations to this effect. Mr. Gresham, then Secretary of State, was unwilling to accept this less formal instrument, and instructed Mr. Alexander as follows: "An examination of the treaty of 1837, has failed to satisfy the Department that it is susceptible of this interpretation." [1] This decision of Mr. Gresham [2] was sus-

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that the trade mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the clause belongs to Congress, and that the act in question is a lawful exercise of this power.

"Every species of property which is the subject of commerce, or which is used or even essential in commerce is not brought by this clause within the control of Congress. The barrels and casks, the bottles and boxes, in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. *Nathan* v. *Louisiana*, 8 Howard, 73. In *Paul* v. *Virginia*, (8 Wall. 168,) this court held that a policy of insurance made by a corporation of one State on property situated in another, was not an article of commerce, and did not come within the purview of the clause we are considering. 'They are not,' says the Court, 'commodities to be shipped from one state to another and then put up for sale.' On the other hand, in *Almy* v. *The State of California*, (24 Howard, 169,) it was held that a stamp duty imposed by the legislature of California on bills of lading for gold and silver transported from any place in that State to another out of the State, was forbidden by the Constitution of the United States, because such instruments being a necessity to the transactions of commerce, the duty was a tax upon exports.

"The question, therefore, whether the trade mark bears such a relation to commerce in general terms as to bring it within Congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we suppose to leave undecided." 100 U. S. 82.

[1] U. S. F. R. 1895, Correspondence with Greece.

[2] "The Declaration" is therefore deemed to be practically a new treaty,

tained by Mr. Olney, his successor as Secretary of State, both in instructions to Mr. Alexander and to the United States Minister to Japan.[1] From these several opinions, any State would be acting well within its rights in refusing protection in trade-marks as a favor in matters of commerce.

Favors in commerce and navigation may be extended then to—

1. The articles of commerce, which, when set in motion, become imports and exports.

2. The agents of commerce, who are the importer, the exporter, and the furnisher of means of transportation, and—

3. The instruments of commerce which are: the vessel, the railroad, the post, the telegraph, the telephone, the bill of lading, money, the bill of exchange, and all its other necessary aids and instruments.

As the primary object of commerce is the exchange of commodities, any favors which its agents or instruments enjoy are indirectly favors to that traffic, not granted with an intent and purpose to benefit the former, but to facilitate the buying, selling and exchange of goods.

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and as such could only be ratified by the President of the United States by and with the advice and consent of the Senate. Since the concurrence of the Senate is necessary for the accomplishment of the object in view, it is deemed best that this object should be set forth in a regular and formal convention instead of a mere declaration." Mr. Gresham to Mr. Alexander. U. S. F. R. 1895, p. 759.

[1] U. S. F. R. 1891, Mr. Olney to Mr. Dun, p. 429.

CHAPTER VI.

Imports are the articles of commerce brought into a State from a foreign country, and an impost or duty on imports is a custom or tax levied on them.[1] As the object of importation is sale, it constitutes the motive and the consideration for the payment of the duty. Imports do not lose their character as such until they have by sale passed from the hands of the importer, and have become incorporated with the general mass of property of the State, or until they have been broken up by him from their original cases for the purpose of sale in smaller quantities.[2] In the latter case the importer has used the privilege he has purchased, and has himself mixed them up with the general mass, and the law may treat them as it finds them.[3]

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[1] "The words imposts, imports, and exports, are frequently used in the Constitution. They have a necessary correlation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same instrument.

"In the case of *Brown* v. *Maryland*, the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicon and of usage, to be articles brought into the country; an impost is there said to be a duty, custom, or tax levied on the article brought into the country." *Woodruff* v. *Parham*, 8 Wallace, p. 128.

[2] Goods imported do not lose their character as imports, and become incorporated into the mass of property of the State until they have passed from the control of the importer, or have been broken up by him from their original cases. *Low* v. *Austin*, 13 Wallace, p. 29.

[3] "And the Court, after observing that it might be premature to state any rule as being universal in its application, *held*, that, when the importer had so acted upon the thing imported, that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and become subject to the taxing power of the state; but that, while remaining the property of the importer in his warehouse in the original form and package in which it was imported the

Chief Justice Marshall laid down the rule most clearly in *Brown* v. *State of Maryland.* "An impost or duty on imports is most usually secured, before the importer is allowed to exercise his rights of ownership over them, because evasion of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them, after they landed. There is no difference in effect, between the power to prohibit the sale of an article and a power to prohibit its introduction into the country; and one would be a necessary consequence to the other. "No goods would be imported, if none could be sold. No object of any description can be accomplished which may not be accomplished with equal certainty, by laying a duty on the thing imported in the hands of the importer." The protection which the character of imports gives to the articles does not cease at the external boundary of the State but accompanies them to any market in the interior to which they may go, and remains with them until by sale, or by being broken from their original cases, they become identified with the common mass of property. So long as the articles remain identified as imports and have paid the custom duties, any further tax or charge placed on them except for services rendered is unfair and discriminating.

Exports are the articles of commerce shipped out of a State to a foreign country. The process of exportation begins when the articles have been actually launched on their way to another State or committed to a common carrier for transportation to that State, and this is the point of time when they cease to be governed exclusively by domestic law and begin to be governed and protected

tax upon it was plainly a duty on imports prohibited by the constitution." *Welton* v. *State of Missouri*, 91 U. S. p. 275.

by the law of commercial regulations, as articles identified as separate from the common mass of property.

When they have been so launched upon their journey, any charge, tax, or custom levied upon them is a duty on exports. It is not sufficient that the articles are gathered together from the surrounding country in a town or city located on the sea, river, or railroad with an intention on the part of the owner to export them; their exportation as yet remains a matter *in fieri;* the intention of the owner through unforeseen circumstances may change; and the goods are still looked upon as belonging to the common mass.[1]

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[1] (After a decision that the fact that personal property was taxed upon the owner of it though he resided in another State, inasmuch as personal property is taxable at the domicile of the owner, was no bar to its taxation within the jurisdiction of the State in which it was found.) "We recur, then, to a consideration of the question freed from this limitation: Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

"Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.

"The question does not present the predicament of goods in transportation through a State, though detained for a time within the State by low water, or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in course of commercial transportation and are clearly under the protection of the constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulations, and that moment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepôt* for that particular region whether on a river or a line of railroad, such products are not yet exports, nor are they in the process of exportations, nor is the exportation begun until they are committed to a common carrier for transportation out of the State to the State of their destination, or

Duties upon exports or imports are taxes levied by the State in its sovereign capacity. They are different from the charges made for the use of bonded warehouses, public storehouses, and for the privilege of allowing goods to lie upon a public dock or wharf. The latter are exacted by right of ownership or control, and are for services rendered. If by treaty all duties upon imports and exports were abolished, articles of commerce arriving in or leaving the State would be liable to charges for the use of any property owned or controlled by the State in the same manner as they would if such property belonged to private individuals.

The general most favored nation clause, or the more limited form specifying "no other or higher duties," requires that duties on imports and exports shall be uni-

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have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed by the State. . . .

"But if such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as a part of the general mass of property in the State, at the regular period of assessment for such property, and in the usual manner, they not being in the course of transportation at the time, is there any valid reason why they should not be taxed? . . .

"But this movement does not begin until the articles have been shipped or started for transportation from one State to another. The carrying of them in carts or other vehicles, or even floating them to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State,and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose of putting it into the course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing." *Coe* v. *Errol*, 116 U. S. p. 517.

form, and that in levying and collecting them there shall be no unfair discrimination against the products of the contracting State.[1] In determining these duties there are two methods employed. The first, which has as its basis or standard of comparison cost and value, called the *ad valorem system;* and the second, where quantity and weight are the standards of comparison, called the *specific system.* With the differentiation of manufacture at the present time and the different methods and materials employed in turning out an article of commerce, it is customary for States to classify by some standard all goods bearing the same generic name and then to tax them by either the *ad valorem* or by the specific method.

[1] "Under the eighth section of the tariff act of August 30, 1842, a duty of fifteen cents per gallon was imposed on port wines in casks; while on the red wines of several other countries, when imported in casks, a duty of only six cents per gallon was imposed. This discrimination, so far as regarded the port wine of Portugal, was deemed a violation of our treaty with that Power, which provides, that, 'No other or higher duties shall be imposed on importation into the United States of America of any article the growth, produce or manufacture of the Kingdom and possessions of Portugal, than such as are or shall be payable on the like article being the growth, produce, or manufacture of another foreign country.' Accordingly, to give effect to the treaty, as well as to the intention of Congress, expressed in a proviso to the tariff act itself, that nothing therein contained, should be construed as to interfere with subsisting treaties with foreign nations, a treasury circular was issued on the 16th of July, 1844, which circular, among other things, declared the duty on the port wine of Portugal, in casks, under the existing law and treaty, to be six cents per gallon, and directed that the excess of duties which had been collected on such wine should be refunded. By virtue of another clause in the same section of the act, it is provided that all imitations of port or any other wines, 'shall be subject to the duty provided for the genuine article.' Imitations of port wine, the production of France, are imported to some extent into the United States; and the Government of that country now claims that, under a correct construction of the act, these imitations ought not to pay a higher duty than that imposed upon the original port wine of Portugal. It appears to me to be unequal and unjust that the French imitation of port wine should be subjected to a duty of fifteen cents, while the more valuable article from Portugal should pay a duty of six cents only per gallon. I therefore recommend to Congress such legislation as may be necessary to correct the inequality." President Polk's Message, December 2, 1845. Sen. Doc. 1, 29th Cong. 1st Sess.

Unless there is some special provision of treaty preventing a State doing so, there is no just ground of complaint if it taxes specifically imports or exports that were formerly charged *ad valorem*, or *vice versa*, provided imports from, or exports to all other countries belonging to the same class are taxed in the like manner. The third article of the treaty between the United States and Portugal, of August 26, 1840, provided that no other or higher duties should be imposed on the importation into the United States of any article, the growth, produce or manufacture of Portugal, than were or should be payable on the like article being the growth, produce or manufacture of any other foreign country. For some time subsequent to the ratification of this treaty, the duty on wines imported into the United States was specific, and the wine of Portugal, more valuable than other wines of the same character or class, paid the same duty per gallon. By legislation in 1841, duties on wines were made *ad valorem*, and the representative of Portugal complained that this *ad valorem* duty was a discrimination against the wines of his country and contrary to the third article in the treaty of 1840, since as a gallon of the wine of Portugal would be obliged upon importation into the United States to pay per gallon a higher tax than the same class of wine coming from any other country, inasmuch as it was the more valuable article. The claim was denied and the arguments of Mr. Webster thoroughly removed all grounds for a charge of unfair discrimination.[1]

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[1] Mr. de Figanière é Morao, Portuguese Minister, protested against Act of Congress approved July 30, 1846, "Reducing duties on imports," as being inconsistent with treaty with Portugal concluded August 26, 1840.

The act referred to provided that, "A duty of 40 per cent *ad. val.* should be levied," etc., on all wines and imitations of wines. The discussion in various phases had continued since 1842 (see *ante*). The Committee on Foreign Affairs reporting to the House on the subject, said nothing re-

The equality of duties applies to the time at which they are levied as well as to their amount. It does not

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mained but to adopt the opinion of Mr. Webster set forth in his note of February 9, 1842, to the Portuguese Minister. The note is conclusive on the subject and shows there is no foundation for the claim of Portugal. Report Committee Foreign Affairs, March 3, 1851. Report 107, Ho. Rep. 31 St. Con. 2d Sess.

Mr. Webster's letter is of great importance in the interpretation of the phrase "No other or higher duties, etc."

Letter:—

" . . . The law complained of was enacted on the 11th day of September, 1841, and its main provision was to lay a duty of 20 per cent *ad. val.* on all such articles as were at that time free, or on which the duty was less than that rate, with certain exceptions. The wines of Portugal not being within the exceptions and being subject at that time only to a specific duty, may fall under an increased charge or duty, by the operation of this law. The third article of the treaty subsisting between the United States and Portugal is in these words: (Quotes article without number). Mr. de Figanière é Morao thinks that the provision of this article is interfered with by the above mentioned act of Congress. He illustrates his own view of the subject by putting the case in the following form:

"A pipe of wine from the Mediterranean or Spain or any other country reaches a port in the United States at a cost, let it be supposed, of thirty cents the gallon and a like pipe of wine from Portugal costing thirty-eight cents per gallon; if the duty be specific, (say fifteen cents) they will both be subject to the same, and neither pay a higher or other duty than the other . . . for fifteen cents per gallon and no more, would be levied on both pipes. Not so, however, according to the act of the 11th of September last, which imposes 20 per cent *ad. val.* The Spanish or other wine will pay only six cents per gallon, while from the like wine of Portugal will be exacted $7\frac{6}{10}$ cents per gallon which *de facto* operates as the discriminating duty against the Portuguese wine, contrary to the stipulation of the treaty between the two countries."

"Mr. Webster states that the language of the third article of the treaty is of the same import as that used in most other treaties of the United States and identical with that in some of them, so the Government must take in view what it can maintain in regard to many other Powers. . . . The interdict of the treaty is: 'No other or higher duties shall be imposed on the importation into the United States of America of any article the growth, produce, or manufacture of the kingdom and possessions of Portugal, than such as are or shall be payable on the like article, being the growth, produce, or manufacture of any other foreign country.'

"The article on which the duty is complained of is wine, and the duty laid on Portuguese wine is exactly the same, in terms, as that laid on the like article (except as excepted in the law) coming from other countries; in other words, all wines fall under the same duty of 20 per cent *ad. val.* In terms, therefore, the law is clearly within the treaty. But Mr. de Figanière

concern the State levying them that some goods left the country of their origin prior to others. The reduction

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é Morao thinks it not in conformity with the spirit and intent of the treaty, because under its operation, a gallon of wine in Portugal may cost more than a gallon of wine in Spain, and therefore, 20 per cent on the cost of the gallon of Portuguese wine will be more than 20 per cent on that of the Spanish gallon; and, consequently, a gallon of Portuguese wine will pay a higher duty than a gallon of Spanish wine. That this may be the result of the operating of the law, cannot be denied; and this makes it necessary to inquire, what is the true interpretation of this third article of the treaty? There may be sometimes difficulties without doubt, in deciding on the just extent of such a provision, and in applying it in the legislation of States bound to regard it; because, in general, articles identically the same, or, in the language of the treaty, alike, are seldom imported from different countries. Yet the provision itself is to be observed, and is to receive a reasonable and just construction. This is the leading rule of interpretation in regard to all treaties and other important compacts. Now it is evident that if Mr. de F——'s idea be correct, the Government of the United States could impose no *ad val.* duty whatever; because, as articles bearing the same general name, and imported from different countries, would of course be of different degrees of value and cost, the country producing those of highest value would always have cause of complaint, if subjected to an *ad val. duty*. The result would be, that the Government of the United States could not exercise its powers at all in one of the most ordinary modes of taxation. As this consequenee would be unreasonable, and evidently not within the contemplation of the parties, the reasoning which would conduct us to it must be rejected.

"We are to consider, then, what is the just meaning of the terms 'other or higher duty;' and to inquire by what standard it is to be known and ascertained, whether duties 'other and higher' are made in a given case. Now, to accomplish this, resort must be had to some measure of comparison, simple or mixed—some rule by which the question is to be decided. What is the rule? What is the standard of comparison? Is some one single consideration to fix that standard, or may reference be had to various considerations? Mr. De F——'s idea is, that the only element of calculation, the only datum to be taken into view, is the quantity of the article; that is to say, he is of opinion that if one gallon pays more duty than other gallon, the duty therefore, is higher in a sense of the treaty. But the undersigned thinks with all respect, that this may well be questioned; he thinks cost and value may be regarded as forming parts of the basis of calculation and comparison, as well as quantity. It is as reasonable, as seems to him, to understand the treaty as saying that merchandise from Portugal shall pay no higher duties than similar merchandise from other countries, according *to its value*, as it is to understand it, as saying it shall pay no higher duties in proportion to its quantity. Cost and value are as reasonable a basis as mere measure, weight or quantity in deciding on the comparison of duties. . . . So, if articles bearing the same gen-

or increase in duty as the case may be must apply to all alike at the same moment.[1]

Silence on the part of the legislature under its sovereign powers to regulate commerce implies that that branch of commerce on which no expression is given, is to be

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eral name, come from different countries, whether they ought to be regarded as the same article, is a question for the solution of which we may look not only to the name but to their cost and value. . . . The article of the treaty under consideration was designed as a stipulation that no unfriendly legislation should be resorted to by one party against the other, nor any preference given to the product of other countries, with intent to injure or prejudice either party to the treaty. The treaty enjoins the spirit and practice of fair and equal legislation; but neither party supposed itself precluded by its stipulation from the ordinary mode of exercising its own power of making law or raising revenue in its accustomed modes; and if it happened, in any case, that, from the operation of laws thus laid with fair intent and for necessary purposes, inconveniences result to either party, that result must be considered as not intent, but as arising from the nature of the case itself, and therefore as unavoidable." *Ibid.*

[1] Duty on cotton goods collected by the United States from Great Britain. Case of Godfrey Pattison & Co.

The second article of the treaty of commerce on July 3, 1815, between United States and Great Britain, provides "that no higher or other duties shall be imposed on the importation into the United States, of any articles, the growth, produce, or manufacture of his Britannic Majesty's territories in Europe, than are, or shall be, payable on the like articles, being the growth, produce or manufacture of any other foreign country." The Act of Congress, passed August 30, 1842, changed and modified the laws imposing duties on imports, so that the duties on cotton goods were nearly double those taxed by the prior statutes. This act took effect two days after its passage, but provided, "that nothing in the act should apply to goods shipped in vessels bound to any port in the United States having actually left her last port of lading eastward of the Cape of Good Hope, or beyond Cape Horn, prior to the first of September, 1842."

Held, that the provision as to equality of duties on importations applied to the time of arrival of such goods, for entry in the country, without reference to the time of shipment, and that so long as goods shipped from ports eastward of the Cape of Good Hope were received in this country at the former prescribed rate of duties, goods shipped from ports of other countries, arriving within the same time, were entitled to enter at the same rate of duty.

(The same was held in regard to claim represented by C. Wirgman, agent. In Wirgman claims no interest was allowed, as duties had not been paid under protest. Reverse in Pattison claims.) Decisions of Commission on Claims under the Convention of February 8, 1853, between United States and Great Britain, Sen. Ex. Doc. 34 Con. p. 301.

free,[1] and, in pursuance of this rule, the cartons, boxes, cases and covers of articles of commerce in which they are packed in the country of their origin or at the place of their shipment are not dutiable, unless they have a value independent of and apart from their contents and are such as would be articles of value, and therefore of commerce, after the contents were removed. If they are intended to accompany them and remain with them in the hands of the retail dealer until the goods are sold to the consumer and are designed only for use in the *bona fide* transportation of the goods, their cost or value is not a dutiable item.[2] If the packing case is of such nature as to be valuable after the contents originally contained therein are removed, it is subject to duty. This would be the case with cut glass perfume bottles, bottles containing wine or other liquors, fancy handkerchief boxes, etc. In certain countries where tin plate is of value, large tins containing kerosene oil or other material are rightly subject to duty, aside from their contents. The question of dutiability of cases depends upon whether or not they are of a material or form designed to evade duty and have an actual value after the extraction of their contents.

Treaties are designed to protect and secure fair and impartial treatment for the products of the soil, manufacture, or fisheries of the contracting parties, and it

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[1] *Gibbons* v. *Ogden*, 9 Wheaton, p. 222, also *Passenger Cases*, 7 How. 283, 462, and *Robbins* v. *Shelby Taxing District*, 120 U. S. 489.

[2] Under section 7 of the Act of March 3, 1883, 22 Stat. 523, the cost or value of paper cartons or boxes, in which hosiery or gloves are packed, in Germany, and transported to the United States, and the cost or value of the packing of the goods in the cartons and of the cartons in an outer case, are not dutiable items either by themselves, or as part of the market value abroad of the goods, unless the cartons are of a material or form designed to evade duties thereon, or are designed for use otherwise than in the *bona fide* transportation of the goods.

Where the cartons are of the usual kind known to the trade before the

does not concern one State that the articles of commerce of another are taxed or free of duty provided that the enforcement of the legislation governing their taxation in no way discriminates against its own articles of commerce.[1] By United States tariff act of 1842, "tea and coffee when imported in American vessels" (and in ves-

act of 1863 was passed as customarily used for covering and transporting such goods, and are intended to accompany them and remain with them, in the hands of the retail dealer, until the goods are sold to the consumer, they are designed for use in the *bona fide* transportation of the goods to the United States, within the meaning of the act, and their cost or value is not a dutiable item. *Oberteuffer* v. *Robertson*, 116 U. S. p. 449.

[1] The second article of the treaty between the United States and Portugal, made on the 26th day of August, 1840, provides as follows, viz: "Vessels of the United States of America arriving, either laden or in ballast, in the ports of the Kingdom of Portugal, and, reciprocally, Portuguese vessels arriving, either laden or in ballast, in the ports of the United States of America, shall be treated, on their entrance, during their stay, and at their departure, upon the same footing as national vessels coming from the same place, with respect to duties of tonnage, lighthouse duties, pilotage, port charges, as well as to the fees and perquisites of public officers, and all other duties and charges, or whatever kind or denomination levied upon vessels of commerce, in the name or through the profit of the Government, the local authorities or any public or private establishment whatever."

This article is confined exclusively to vessels. It does not include cargoes, or make any provision for an indirect trade,—that is, it does not provide for the introduction of articles which are the growth, produce, or manufacture of some third country, into the ports of Portugal in American vessels upon the same terms upon which they are introduced in Portuguese vessels, or the introduction of such articles into the ports of the United States in Portuguese vessels upon the same terms upon which they are introduced in American vessels. These classes of cases are left open to the legislation of each country.

The tariff act of Congress passed on the 30th of July, 1846, has the following section:

"Schedule I—(exempt from duty). Coffee and tea when imported direct from the place of their growth or production, in American vessels or in foreign vessels, entitled by reciprocal treaties to be exempt from discriminating duties, tonnage and other charges."

The treaty with Portugal is not one of those referred to in this paragraph.

Consequently, a cargo of coffee imported from Rio Janerio in a Portuguese vessel was subject to a duty of 20 per cent, being the duty upon non-enumerated articles. *Oldfield* v. *Marriott*, 10 Howard, p. 146.

The above case gives an interesting summary of the commercial tariff history of the United States, in the opinion rendered by Mr. Justice Wayne.

sels of other countries enjoying the rights of American vessels by treaty) "from the places of their growth or production" were made free of duty; but when otherwise imported were subject to a duty of twenty per cent *ad valorem*. The Netherlands being largely engaged in the exportation of coffee, which was carried to the parent country from the Dutch Provinces of Java and Surinam, protested against the act as a violation of that clause in her treaty with the United States which provided for "no other or higher duties," etc. As The Netherlands had always held her provinces to be separate and distinct from the parent country, and required separate arrangements for any trade therein,[1] they were regarded as different countries; and the privilege of importing coffee from The Netherlands free of duty, which would have given her control of the carrying trade in coffee from the East Indies, was justly denied. Under this act, coffee, the product of Brazil, was, upon direct importation in the authorized vessels, admitted free of duty, and, in a report made by the Committee on Commerce of the House of Representatives,[2] it was said: "Brazil for example has the privilege of importing her

[1] Message of President Monroe, March 20, 1818, contains report of Secretary of State J. Q. Adams as follows:

"The other difficulty which occurred in the negotiations related to the admission of vessels of the United States into the colonies of The Netherlands, if not upon the same footing as into the ports of The Netherlands in Europe, at least upon that of the most favored nation. To this it was objected by the plenipotentiaries of The Netherlands, that certain favors were granted by them to other nations, themselves possessing colonies, for the equivalent of similar favors conceded in return, which could not be conceded to a nation possessing no colonies, and therefore not enabled to concede the equivalent. The same objection having been made by the British Government to the admission of vessels of the United States into their colonies, it appears to deserve attention how far the principle itself is justified, and how far the United States ought to acquiesce in it." Am. St. Papers, F. R. vol. IV, p. 172.

[2] By tariff act of 1842, "Tea and coffee when imported in American vessels from the places of their growth or production," were made free of

own coffee into the United States, in our own vessels, free of duty. This privilege she has got by treaty. Hol-

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duty; but when otherwise imported were subject to a duty of 20 per cent *ad valorem.*

"Soon after the passage of this act, the question of the validity of the 20 per cent duty on the subjects of The Netherlands was presented to this Government, in a remonstrance from the Chargé d' Affaires of that Nation. . . . During the recess of Congress, the Secretary of the Treasury took the subject into his own hands, and has superseded the action of this House, on the pending question, by a full and unreserved concession of the whole subject-matter under investigation, even to the extent of refunding all duties collected since 1842." Report Committee on Commerce, Ho. Rep. 188, 28th Congress, 2d Sess.

That, by the tariff act of 1842, "Tea and coffee when imported in American vessels from the places of their growth or production" are made free of duty; but when otherwise imported, are made subject to a duty of 20 per cent. The effect of this discrimination is, that coffee imported from Brazil and some other Nation is free of duty; but when imported from The Netherlands, is liable to 20 per cent duty. Coffee from Java, Surinam, and other provinces of Holland, is usually carried to the parent country in Europe, and from thence, by the operations of commerce, distributed to other Nations. This trade, by the discrimination of the act of 1842, is cut off between Holland and the United States; and the question is, has the Congress of the United States, consistently with the existing treaties between The Netherlands and United States, a right to pass such a law? There are two treaties in force between The Netherlands and the United States. The treaty of 1839 stipulates entire equality and reciprocity in navigation, and forbids any discrimination between the vessels of the United States and those of The Netherlands, in the trade between the United States and Europe. And by the treaty of 1782, it is prescribed, "That the subjects of The Netherlands shall pay in the ports, Havens, Roads, Countries, Islands, Cities or places of the United States of America, or any of them, *no other or greater duties or imposts of whatever nature or discrimination* they may be than those which the nations the *most favored* are, or shall be, obliged to pay."

"It is impossible for language, it appears to your committee, to be more explicit and clear; not only to secure to 'The subjects of The Netherlands' all advantages which, by the laws of the United States, may be extended to the most favored nations, but to exclude all 'discriminations' which tend in the least degree to place them on a footing of equality with other nations. . . . The discrimination set up by the Act of 1842, by which coffee imported from The Netherlands into the United States is put under a duty of 20 per cent, whilst the coffee of Brazil is exempted from all duty, is a clear violation of the treaty of 1872. It is laying other and greater duties on the subjects of The Netherlands than 'Nations the most favored are obliged to pay.'"

The Committee was of opinion that all duties collected on coffee from

land, claiming Brazil to be a favored nation, demands, not the same privilege of importing her own productions

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Holland under the Act should be refunded, and that no duty should be collected thereafter. Report 534, Ho. Rep. 28th Cong. 1st Sess. (Report to accompany House Bill No. 410) June 7, 1844.

On the other hand, the Committee on Commerce, 28th Congress, 2d Session, in report No. 410, dated March 3, 1845, to accompany a joint resolution that there was no justification or warrant, in any proper construction of the treaties between the United States and The Netherlands, for the order heretofore issued by the treasury department, by which coffee, imported from The Netherlands in Dutch vessels, is directed to be exempted from duty, and by which the duties heretofore paid on such importations, have been directed to be refunded; and that such order is contrary to law, and ought to be immediately revoked.

The argument of the report is: "Brazil, for example, has the privilege of importing her own coffee into the United States, in our own vessels, free of duty. This privilege she has got by treaty. Holland, claiming Brazil to be a favored nation, demands, not the same privilege of importing her own productions into the United States, but the privilege to import coffee from the East Indies to the Netherlands, and thence to the United States, in her own vessels without duty. This is what she construes to be the *same favor* that is granted to Brazil. But Brazil may not import coffee into her own ports from the East Indies, and then bring it in her own vessels to the United States, free of duty. The citizens of the United States themselves, cannot do this. Brazil may only supply her own coffee in the mode prescribed. Holland may do exactly the same thing, whenever she is in possession of a subject for the trade. If the crop of Brazil should fail, then her privilege fails. And so the privilege now fails as to Holland; not because her crop has failed, but because she is not able to make one, . . . the Brazilians may import their coffee into the United States, in their own vessels, duty free; because they have granted equivalence to the United States for this privilege. So the merchants, of the Hanse Towns, the Swedes, and the Danes, may import coffee from Brazil in their own vessels, duty free, because they have also granted equivalence. Not so with Holland; the privilege being, as we have said, confined to voyages to and from their own ports.

Neither the citizens of the United States, nor the subjects of any other nation, may import coffee into our own ports, free of duty, from France, England, Holland, or from any other country which does not produce it; simply because the law, which is common to all, forbids it. There is no favoritism in this—no preference. How can the subjects of The Netherlands complain? How can they ask a favor to be extented to them, which is not extended to any other nation—not even to our own citizens?—the favor, namely, of importing coffee, duty free, from places not the places of its production?"

From the first report of the Foreign Relations Committee it is evident that this body was swayed by outside influences. They mentioned the great

into the United States, but the privilege to import coffee from the East Indies to The Netherlands, and thence to the United States in her own vessels without duty. This is what she construes to be the same favor that is granted to Brazil. But Brazil may not import coffee into her own ports from the East Indies, and then bring it in her own vessels to the United States, free of duty. The citizens of the United States themselves cannot do this. Brazil may only supply her own coffee in the mode prescribed. Holland may do exactly the same thing, whenever she is in possession of a subject for the trade. If the crop of Brazil should fail, then her privilege fails. And so the privilege now fails to Holland; not because her crop has failed, but because she is not able to make one. . . . How can they ask a favor to be extended to them which is not extended to any other nation—not even to our own citizens?—the favor, namely, of importing coffee, duty free, from places not the places of its production."

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commerce between Holland and America, seven eighths of which was carried in American vessels, and the important privileges enjoyed in supplying Holland's West India Colony. (Shipping interests). The same influence was doubtless brought to bear upon Mr. Bibb, Secretary of the Treasury, whose argument based solely on the treaty of 1839, is very lame.

Evidently the collection of these duties (Dutch coffee) continued, for President Polk in his annual message December 2, 1845, said: "By the Act of the 13th of July, 1832, coffee was exempted from duty altogether. This exemption was universal, without reference to the country where it was produced, or the national character of the vessel in which it was imported. By the tariff act of the 30th of August, 1842, this exemption from duty was restricted to coffee imported in American vessels from the place of its production; whilst coffee imported under all other circumstances was subject to a duty of 20 per cent *ad val.* Under the act, and our existing treaty with the King of The Netherlands, Java coffee imported from the European ports of that Kingdom into the United States, whether in Dutch or American vessels, must pay this rate of duty. The Government of The Netherlands complains that such a discriminating duty should have been imposed on coffee, the production of one of its colonies, and which is chiefly brought from Java to the ports of that Kingdom, and exported from thence to foreign countries. Our trade with The Netherlands is highly beneficial to both

It is on the same ground that the acts of Congress of 1865 and 1872, which provided for an additional duty of 10 per cent *ad valorem* on the importation of goods produced by countries East of the Cape of Good Hope, when imported from places West of the Cape, were sustained in the face of objections on the part of those who imported them from the latter places.[1] The question as to whether or not objection might be offered on the part of the countries East of the Cape will be discussed elsewhere.

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countries, and our relations with them have ever been of the most friendly character. Under all the circumstances of the case, I recommend that this discrimination should be abolished, and that the coffee of Java, imported from The Netherlands, be placed upon the same footing, with that imported directly from Brazil and other countries where it is produced."

[1] "The case is substantially disposed of by *Hadden* v. *The Collector*, 5 Wall. 107, and *Sturges* v. *The Collector*, 12 id. 19. Section 3 of the Act of June, 6, 1872, 17 Stat. 232, is in all material respects like the statutes under consideration in those cases where we held that countries 'beyond the Cape of Good Hope' and 'East of the Cape of Good Hope' meant countries which, at that time, the United States ordinarily carrried on commercial intercourse by passing around that Cape. Although the Act of 1872 was passed after the Suez Canal was in operation, we see no indication of an intention by Congress to give a new meaning to the language employed which had already received a judicial construction. The words used are words of description, and indicate to the popular mind the same countries now that they did before the course of trade was to some extent changed by cutting through the Isthmus of Suez. The object of Congress was to encourage a direct trade with those Eastern countries. For this purpose, in legal effect, a bounty was offered to those who imported the products of that region directly from the countries themselves, instead of from places West of the Cape.

"We see nothing in the act in conflict with the treaty with Persia. . . . If the subjects of Persia export their products directly to the United States, they are required to pay no more duties here than the 'merchants and subjects of the most favored nation.' It is only when their products are first exported to some place West of the Cape, and from there exported to the United States, that the additional duty is imposed. Under such circumstances, the importation into the United States is not, commercially speaking, from Persia, but from the last place of exportation." *Powers* v. *Comly*, 101 U. S. 789.

"The sole question is, whether the additional duty of ten per cent *ad valorem* was or was not lawfully exacted; and this depends on the question whether the provision of the Act of 1865, for the payment of 10 per cent on goods produced from countries East of the Cape of Good Hope when

A State will not be acquitted of a charge of unfair and unequal treatment if it extends a gratuitous favor to the products of a particular geographical district, which may or may not contain organized States, and refuses it to nations which are entitled to like treatment under the most favored nation clause. By acts of Parliament of September, 1835, and July, 1836, Great Britain admitted "rice, rough and in the husk, imported from the West Coast of Africa" at a duty of one penny per quarter. By general customs law, the same article when imported from America, paid a duty of twenty shillings a quarter. The American Government protested against this discrimination as a violation of the second article of the treaty of July 3, 1815, and, as a result, Great Britain in 1842 passed an act equalizing duties on rice, but refused to return the exchequer bill deposited by importers of American rice in lieu of payment of duty under protest. Lord Aberdeen maintained that there had been no intention of discriminating against America; was doubtful if the treaty had been violated; and said that the concession was given to negroes on the West Coast of Africa for the sake of humanity.[1] The Commission of Claims under the Convention of February, 1853, between the United States and Great Britain sustained the position taken by the United States and the exchequer bills were returned.[2] The same rule holds good with regard to the duties on exports. During the period, July 3, 1815, and

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imported from places West of the Cape, was a general commercial regulation for the encouragement of direct trade with those countries, as well as for the benefit of American shipping, or whether it was intended simply as an increase of duties for the purpose of revenue. . . . We are of opinion that it was intended as a general regulation of commerce. . . . The law in various forms has been in existence since 1861." *Russell* v. *Williams*, 106 U. S. p. 623.

[1] Ho. Ex. Doc. 278, 28th Con. 1st Sess.

[2] Decisions of Commission of Claims under the Convention of February 8, 1852, between the United States and Great Britain, Sen. Ex. Doc. 34th Con.

January 26, 1823, Great Britain, in violation of the favored nation clause of the treaty of 1815, levied a duty of 10 per cent *ad valorem* on woolens shipped to the United States, while the same articles when exported to China, Java, Manila, etc., were duty free. The Commission on Claims above referred to decided that the claims arising through violation of the treaty were valid; that the statute of limitation was no bar to their recovery, and they were ordered paid.[1]

A tax upon imports or exports may be levied by the means of stamps which are, in fact, the receipts for charges paid, but the variation in form does not alter the material fact that these taxes are upon imports and exports. It happens, however, that a State in the proper enforcement of its internal revenue laws is obliged to identify articles of commerce, which are separated from the common mass

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[1] (King & Gracie claims).

Duties illegally assessed on woolen goods exported from Great Britain in violation of treaty of July, 1815, during the period July 3, 1815, to January 26, 1823, remained to be adjusted by the Commission of Claims under the convention of February 8, 1853, between the United States and Great Britain. The decision of the commission was, that 10 per cent *ad valorem* had, during the period mentioned, been levied on woolens shipped to the United States and some other places, while woolens exported to China, Java, Manila, etc., were duty free, in violation of favored nation clause in treaty of 1815. American claims were declared valid and ordered paid when proof of proper ownership was given.

"The first arising for the consideration of a commission is, whether any legal bar on account of lapse of time exists against sustaining a claim for a return of duty. This seems now hardly to be contended, for where a treaty is made between two independent powers, its stipulations cannot be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the prosecution of any claims under a treaty made by them, then neither country can interpose such limit. The case admits of no other judicial constructions, the legal advisers of the Crown concur in this view, and the commissioners have no doubt on the point.

"It is conceded, as a matter of fact, that an inequality in duties existing in violations of the provisions of the treaty, and, there being no bar to the recovery of the claim from lapse of time, such duties should be refunded."

The claims were withdrawn from commission by the agent and settled

as imports or exports, for the purpose of securing them from the imposition of the internal tax, and a stamp may be resorted to to accomplish this. If it is, the charge for thus identifying the property should be commensurate with the labor and cost involved with the operation.[1]

The character of a tax is determined, not by the form or agency through which it is to be collected, but by the subject on which the burden is laid; and, as the bringing of goods from the seller to the buyer is commerce, any tax upon the persons necessary for these operations is a tax upon the goods. In *Brown* v. *the State of Maryland*, it was held that an act of the State Legislature, requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by

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privately by the British Government. Report of Decisions of The Commission of Claims under the Convention of February 8, 1853, between United States and Great Britain, pp. 305 to 310, Sen. Ex. Doc. 34th Con.

[1] The stamp thereby required was a means devised for the prevention of fraud by separating and identifying the tobacco intended for exportation, thus relieving it from taxation to which other tobacco was subjected.

The proper fees accruing in the due administration of the laws and regulations necessary for the protection of the Government against imposition and fraud likely to be committed under the pretext of exportation, are, in no sense, a duty on exports. They are simply the compensation for services properly rendered.

Opinion:

"One cause of difficulty in the case arises from the use of stamps as one of the means of segregating and identifying the property intended to be exported. It is the form in which many taxes and duties are imposed and liquidated; the stamps being seldom used, except for the purpose of levying a duty or tax. But we must regard things rather than names. A stamp may be used, and, in the case before us, we think it is used for the very contrary purpose, — that of securing exemption from a tax or duty. The stamps required by recent laws to be affixed to all agreements, documents and papers, and to different articles of manufacture, were really and in truth taxes and duties, or evidences of the payment of taxes and duties, and were intended as such. The stamp required to be placed on gold dust exported from California by a law of that State was clearly an export tax, as this court decided in the case of *Almy* v. *The State of California*, 24 Howard, 169. In all such cases, no one could entertain a reasonable doubt on the subject. The present case is different, and must be judged by its own circumstances. The sense and reason of the thing will generally determine

wholesale, bale or package, etc., to take out a license for which they were required to pay fifty dollars, and in case of neglect or refusal to take out such license, subjected them to certain forfeitures and penalties was void as a tax upon imports and as a regulation of commerce.[1]

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the character of any case that can arise." *Pace* v. *Burgess, Collector*, 92 U. S. p. 372.

[1] An act of a State Legislature, requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale or package, etc., to take out a license for which they shall pay fifty dollars, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the Constitution of the United States which declares that "No State shall, without the consent of Congress, lay any imposts or duty on imports or exports, except what may be absolutely necessary, for executing its inspection laws;" and to that which declares that Congress shall have the power "to regulate commerce with foreign nations, among the several States, and with the Indian tribe."

Opinion of Chief Justice Marshall:

"An impost or duty on imports, is a custom or tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they landed. . . . There is no difference in effect between the power to prohibit the sale of an article, and a power to prohibit its introduction into the country; and one would be a necessary consequence of the other. No goods would be imported, if none could be sold. No object of any description can be accomplished by laying a duty on importation which may not be accomplished with equal certainty, by laying a duty on the thing imported, in the hands of the importer. It is obvious, that the same power which imposes a light duty, can impose a very heavy one, . . . one which amounts to a prohibition. . . . The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as a consideration for which the duty is paid, every principle of fair dealing, requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. . . . The whole course of legislation on the subject shows, that, in the opinion of the legislature, the right to sell is connected with the payment of duty . . . in the first place the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the

While it is within the province of a State to tax occupation, in so doing care must be taken that there is no dis-

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United States, until he shall also purchase it from the State. In the last cases (original packages), the tax finds the article already incorporated with the mass of property, by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. . . . The State, it is said, may tax occupation, and this is nothing more. It is impossible to conceal from ourselves, that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . In support of the argument, that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As, to export, it is said, means only to carry goods out of the country, so import means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity of language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? . . . 2. It is also repugnant to that clause in the Constitution which empowers Congress to regulate the commerce with foreign nations, and among the several States, and with the Indian tribes. What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States? This question was considered in the case of *Gibbons* v. *Ogden*, 9 Wheaton, 1, in which it was declared to be complete in itself and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior. We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned." *Brown* v. *State of Maryland*, 12 Wheaton, 419.

It was held that an act requiring every auctioneer to collect and pay into the State Treasury a tax on his sales, is, when applied to imported goods in the original packages, by him sold for the importer, in conflict with the provisions of the Constitution, and, therefore, void, as laying a duty on imports and being a regulation of commerce. *Cook* v. *Pennsylvania*, 97 U. S. p. 566.

crimination against the commerce of those nations who are by treaty entitled to fair and equal treatment. A tax upon an agent for the sale of articles of foreign manufacture is a discrimination against imports if the sale of home products is untaxed.[1]

While a tax upon the occupation or sales of an importer is a tax upon the goods and becomes a duty on imports, it cannot be said that the same is true of the occupation

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"According to it, the Statute of Texas is inoperative, so far as it makes a discrimination against wines and beers imported from other States when sold separately from other liquors.

"A tax cannot be exacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when a home manufacture. If a party be engaged exclusively in the sale of these liquors, or in any business for which a tax is levied because it embraces a sale of them, he may justly object to the discriminating character of the act, and on that account challenge its validity, under the decision in question (*Brown* v. *Maryland*), but if engaged in the sale of other liquors, than beer or wines, he cannot complain of the State on that ground." *Tiernan* v. *Rinker*, 102 U. S. p. 123.

[1] "By these sections, read together, we have this result: The agent for the sale of articles manufactured in other States must first obtain a license to sell for which he is required to pay specific tax of each county in which he sells or offers them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers, and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the article, that is, upon their having been manufactured without the State, it is to that extent, a regulation of commerce between the States. It matters not whether the tax be laid directly upon the article sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting within her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States. . . .

"Commerce among the States in any commodity can only be free when the commodity is exempted from all discriminating regulations and burden imposed by local authority by reason of a foreign growth or manufacture." *Weber* v. *Virginia*, 103 U. S. p. 344.

of a commercial traveler or drummer. He is more remotely removed from transactions necessary to the importation of the goods, and while his business is commerce, he is neither an exporter nor an importer.[1] Unless bound by treaty it would seem that a State can either exact a license fee from an alien commercial traveler, or even forbid his doing business within its territory; but if the commercial travelers of one nation are admitted, equal treatment in matters of commerce requires that the drummers of all other nations who have the rights of favored nation treatment should be admitted upon the same terms.[2]

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[1] The Supreme Court of Tennessee having decided that the law of that State imposing an annual tax upon "all peddlers of sewing machines and selling by sample" levied such "tax upon all peddlers of sewing machines without regard to the place of growth or produce of material or of manufacture," that law, so construed is not in violation of the Constitution of the United States. *Machine Co.* v. *Gage*, 100 U. S. p. 676.

Opinion:

[2] Chapter 96, section 16, Stats. Tenn. 1881, enacting that "all drummers and all persons, not having a regular license house of business in the "taxing district of Shelby County," offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee, the sum of ten dollars per week, or twenty-five dollars per month for such privilege," applies to persons soliciting the sale of goods on behalf of individuals or firms doing business in another State; and so far as it applies to them, is a regulation of commerce among the States, and violates the provision of the Constitution. . . . A State may enact laws which in practice operate to affect commerce among the States as by providing in the legitimate exercise of its police power and general jurisdiction, for the security and comfort of persons and the protection of property; by establishing and regulating channels for commercial facilities; by the passage of inspection laws and laws to restrict the sale of articles injurious to health and morals; by the imposition of taxes upon a vocation within its borders, not interfering with foreign or interstate commerce or employment, or with business exercised under the authority of the Constitution. . . .

"Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand.

A regulation which relieves the importer of goods of one country from any charge on the transactions necessary to bring his goods to the seller, must be extended upon equal terms to the importers of the goods of those nations which enjoy the privileges of most favored nation;

The raiser of farm produce in New Jersey and Connecticut, . . . may, perhaps, safely take his goods to the City of New York and be sure of finding a salable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or a manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or a store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other States? Must he sit still in his factory and warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding. . . .

"The truth is, that in numberless instances, the most feasible, if not the only practical way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. . . .

"The right to tax would apply equally as well to the principal as to his agents, and to a single act of sale as to a hundred acts."

The dissenting body, composed of Chief Justice Waite, Justice Field and Justice Gray, held that the tax should be sustained on the following grounds:

1. The fee is exacted from all alike to do that kind of business, unless they have a licensed house of business within the district. There is no discriminating between citizens of the State and citizens of other States.

2. The drummer bargained and so carried on a business with his sample, the same as if he had his goods with him; and in so doing, acted the same as a merchant who had a licensed warehouse or place of business in the State.

and a regulation that imposes upon the occupation of an importer or exporter, or the agents of either, any higher or greater charges than are levied upon the occupation of a dealer in like articles, when of domestic origin, or his agents, is *pro tanto* a duty on imports and exports as the case may be. Of such nature too would be greater charges for the use of the instruments of commerce,—the ship, the railroad, etc.,—in transporting the goods to their market and effecting their sale.

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3. There is really no difference between a drummer and a peddler.

4. The law is valid so far as concerns the citizens of the State.

5. The facts of the case show the need of such a tax. Memphis is on the Mississippi River, and as there is a tax on home merchants, one of these could move across the river and thus avoid it by claiming Arkansas as his domicile. *Robbins* v. *Shelby Taxing District*, 120 U. S. p. 489.

CHAPTER VII.

Instruments of commerce are employed to transport articles from the country of their origin to the foreign market, to protect them during their journey, to facilitate their sale, and to secure payment from the purchaser. While the transportation of persons and goods by any common carrier is commerce, international trade at the present day employs almost exclusively the ship and the railroad. Embarking persons and property upon vessels, transporting them over navigable waters, and landing them at their destination is, in a commercial sense, navigation. It relates to the means of carriage over water, and is commonly synonymous with "shipping" or "carrying flags;" and the shipping of a State taken collectively is called its merchant marine. Merchant vessels when engaged in international trade are encouraged and protected by the State whose flags they fly, for two reasons:

1. Through a cheapening in transportation charges, they enlarge the foreign markets for the productions of the State; and—

2. The profits accruing to the owners of the vessel, in transporting for hire persons and goods between different foreign ports, contribute to an increase in national wealth.

By virtue of that complete sovereignty which every State possesses within its own jurisdiction, and in the absence of any treaty stipulations to the contrary, theoretically, a nation would be justified in denying to vessels of a foreign country the right to enter her ports or ply in the navigable waters within her borders. Modern

practice and the necessities of commercial intercourse have given a more generous application of this rule and all civilized States consent to the admission in their ports of foreign vessels for the purpose of trade, but usually by right of sovereignty exact for the privilege, a tax upon the vessel which is called a tonnage tax.

A tonnage tax is a charge or duty levied upon a vessel as a carrier and measured by the capacity of the vessel.[1] It is a contribution claimed by the State by virtue of its sovereignty, for the privilege of entering, lying in, departing from, loading or unloading at its ports, and does not comprehend services rendered or conveniences provided for the vessel. The United States Supreme Court has described it as being "A charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public

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[1] So much of the act of the legislature of New York, amended April 17, 1865, as required, with certain exceptions, all ships or vessels which enter the port of New York, or load or unload, are made fast to any wharf therein, to pay a certain percentage per ton, to be computed on the tonnage expressed in the registers of enrolments of such ships or vessels respectively, is in violation of the Constitution of the United States, and therefore void.

Opinion:

"It is insisted by the counsel for the appellant that the charge here in question is a regulation of commerce, which it is not competent for the State to prescribe, and also a tonnage duty, which the State was forbidden to impose.

"Our remarks will be confined to the latter proposition. . . .

"Tonnage, in our law, is a vessel's 'Internal cubical capacity in tons of one hundred cubic feet each, to be ascertained' in the manner prescribed by Congress . . . 'Tonnage duties are duties upon vessels in proportion to their capacity.' Bouv. Law. Dict., 'Tonnage.'"

"The term was formally applied to merchandise. Cowel, in his Law dictionary, published in 1708, thus defined it: 'Tonnage (*Tonnagium*) is a custom or impost paid to the King for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton, and of this you may read in the Statutes of 12th Edw. IV. c. 3; 6 Henry VIII, c. 14,' etc. The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself." *Inman Steamship Co.* v. *Tinker*, 94 U. S. p. 238.

waters of the country. . . . It is a tax . . . imposed by virtue of sovereignty, not claimed in right of proprietorship." It does not take into account the value of the ship as property, for such a tax can be justly levied only in the home port where she is regularly registered, and where her owner or manager usually resides.[1]

The amount of a tonnage tax may be determined either by the nationality, that is the flag of the vessel, or by the geographical position of her last port of departure and the character of the goods she carries. In the first instance, the tax is called national, and in the second geographical; but the fact that it is one or the other, will not relieve the State imposing it from liability for damages if, in its operation, it discriminates unfairly against the goods or vessels of a nation entitled to fair and equal treatment.

Bearing in mind that merchant vessels are not only useful as profit earners for their owners, but are the necessary instruments to a foreign commerce, it will be found that any amendment or alteration of whatever description in a tonnage tax of one nation will affect all other nations with which it has commercial relations, either by altering the charges on their vessels, by changing the conditions of the market in which their goods are sold,

[1] "The State in which is the home port of a vessel, that is to say, where she is regularly registered, and nearest to her owner, husband, or acting or managing owner usually resides in the State which has dominion over her for the purposes of taxation." *Morgan* v. *Parham*, 16 Wallace, page 471.

Held that steamboats which ply between different points on a navigable river may, under a state statute, be taxed as personal property in the city where the company owning them has its principal office, and which is their home port, although they are duly enrolled and licensed as coasting vessels under the laws of the United States, and all fees and charges thereon demandable under those laws have been duly paid. The tax must be levied on the owner at his place of residence and must be levied on the ships as property and not as vehicles of commerce and according to their tonnage capacity. *Transportation Co.* v. *Wheeling*, 99 U. S. p. 273.

or both. Where the tonnage tax is national in character, and a favor is extended by one nation to the vessels of another, the same favor, upon terms of reciprocity, should be readily granted to the vessels of all other nations enjoying the privileges of most favored nation treatment.

The Acts of Congress of March 3, 1815 repealed as much of the preceding acts as imposed a discriminating duty on the tonnage of foreign vessels, whenever the President was satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operated to the disadvantage of the United States, had been abolished. The favors provided for by this Act were first availed of by Great Britain in the treaty of July 3, 1815, and the example set by her was followed by nearly all countries having treaties with the United States, who secured the same favor upon terms of reciprocity. France, relying upon the most favored nation clause in the Treaty of Cession of Louisiana, demanded for her vessels the same treatment in the ports of that territory as were enjoyed by English vessels in ports of the United States, without offering the equivalent given by Great Britain. Her claim was abandoned in 1831.[1] Of the same nature was the concession granted by the United States to Belgian vessels by treaty of 1858. Article 4 of this Convention provided that the steam vessels of Belgium engaged in regular navigation from that country to the United States should be exempt from the payments of duty, tonnage, anchorage, buoys and lighthouses, which was more favorable treatment even than American vessels enjoyed. These favors, it was conceded by the United States, belonged to the vessels of all countries that were entitled to most favored nation treat-

[1] See *post* — chap. III.

ment, provided they extended to United States vessels in their ports the treatment which Belgium had guaranteed as an equivalent for the favor. In examining the claim made on this occasion by Sweden and Norway, it was found that there was no regular line of steamers flying the United States flag engaged in regular navigation between American ports and Swedish and Norwegian ports, by whose treatment in the latter it could be determined whether or not Sweden and Norway conceded the equivalent required. In an opinion proving the validity of the claims presented, the Attorney General remarked: "It is to be presumed that they (Sweden and Norway) will, when the occasion shall arise, faithfully perform their duty under the treaty; for the obligations imposed by them are reciprocal. But either of the contracting parties may claim the benefit of them, even if the other should never inaugurate regular steam navigation between the two nations."[1]

The number of cases where favors in tonnage dues have been extended gratuitously to vessels because their last port of departure lay within a particular geographical district or zone, is limited, but there are two of importance arising during the last century wherein the United States was an interested party. Prior to 1828, the tonnage dues paid by vessels entering the ports of Norway were determined by the geographical position of the port from which they last came, irrespective of the nationality of the vessel. The charges were as follows:

1. For vessels arriving from ports outside of Europe, except the Mediterranean,—maximum rates.
2. Vessels from the Mediterranean,—mean rates.
3. Vessels from European ports,—minimum rates.

To a request made by the United States that her vessels,

[1] 14 Op. At. Gen., 468, Williams.

when arriving in ports of Norway from ports in the United States, might receive the same treatment as when arriving from European ports, and, therefore, be required to pay only the minimum charges, Norway answered that there was no discrimination against the navigation of the United States in the regulations complained of. It was argued that vessels of the United States would be entitled to the minimum rate when arriving from European ports equally with the vessels of all other nations; that their ships were treated just as Norwegian ships (*exercant la même navigation*); and that if America had the lowest rate she would fare better than even Norway herself. To this Mr. Clay replied: "States situated remotely from each other labor under a great disadvantage in their commercial intercourse, from the space which separates them. It increases the charges on the object of their commercial exchanges, and consequently lessens the mutual consumption of their respective commodities. Ought this advantage to be augmented by an increase of tonnage or any other duty? . . . It is stipulated, for example, in the ninth article, (treaty of 1827) that no duties of any kind or denomination shall be levied upon a product of the soil or industry of the respective countries, than such as are levied upon similar products of any other country. The object of this stipulation was to secure in the consumption of the respective countries an equality in their competition. But if a vessel ladened with the produce of the United States is burdened on her entry into the ports of Norway with higher duties than a vessel ladened with similar products and entering the same ports from any part of Europe, that equality is as much disturbed in effect as if the unequal imposition were directly upon the cargo, instead of the vehicle which transports it." He showed conclusively that there was a commercial favor enjoyed gratuitously by the European countries, not in

their shipping, for the vessels of all countries sailing from their ports to ports in Norway received equal treatment, but through the fact that their goods when carried into the markets of Norway could be sold cheaper, since the cost of their transportation, through lighter tonnage dues, had been less. The regulations of Norway complained of were so modified as to admit the vessels of the United States arriving from home ports upon the same terms as when arriving from ports in Europe.[1]

By Act of Congress of June 26, 1884, tonnage duties on vessels coming from Central and North America, Mexico, Columbia and British possessions in America were made one half those collected on vessels arriving from other parts of the world. Belgium, Denmark, Germany, Portugal, Norway and Sweden claimed like treatment for their vessels arriving from home ports in ports of the United States, on the ground that the reduction made for vessels coming from the given zone was categorical and absolute; that it constituted a general favor granted gratuitously and unconditionally to certain specified countries, and should apply to their own vessels as soon as the Act went into operation.[2] Mr. Bayard, Secre-

[1] U. S. For. Rel. 1887, pp. 1050–51.

[2] Under act of June 26, 1884, tonnage duties on vessels coming from Central and North America, Mexico, Columbia and British possessions, were made one half those collected on vessels coming from other parts of the World.

Belgium, under most favored nation clause, in treaty of 1875, article 12, claimed like treatment for Belgian steamers coming to America from Belgium, on the ground that, "This reduction to three cents for vessels coming from a given zone, is categorical and absolute; it constitutes a general favor, granted gratuitously and unconditionally, to certain specified countries; it consequently should have been made to apply to vessels coming from Belgium as soon as the act of June 26, 1884, went into operation." Mr. de Bounder to Mr. Bayard, U. S. For. Rel. 1885, p. 64.

Mr. Bayard's reply quotes decision of the Department of Justice as follows: "The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act, and entered in our ports is, I think, purely geographical in character, inuring to the advantage of *any* vessel of

tary of State, replying, quoted the decision of the Department of Justice as follows: "The discrimination as to tonnage duty in favor of vessels sailing from the region mentioned in the Act, and entered in our ports, is, I think,

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any power, that may choose to fetch and carry, between this country and any port embraced by the fourteenth section of the act. I see no warrant, therefore, to claim that this is anything in the 'most favored nation' clause of the treaty between this country and the Powers mentioned that entitles them to have the privileges of the fourteenth section extended to their vessels sailing to this country from ports outside of the limitation of the act." Mr. Bayard to Mr. de Bounder, U. S. For. Rel. 1885, p. 65.

Denmark made same claim under article 1, treaty of 1826, and received identical reply. *Ibid.* pp. 362–3.

Germany also. *Ibid.* pp. 443–4.

Portugal. *Ibid.* pp. 651 and 654.

In correspondence with Portugal, first letter from Mr. Bayard quoting views of Secretary of Treasury, agrees that Portuguese vessels sailing from ports in Portugal, where no light or tonnage charges are levied, are entitled to three cents per ton reduction. U. S. For. Rel. 1885, p. 653.

On November 7, 1885, however, Mr. Bayard reverses his decision and sends, after referring question to the Attorney General, a note identical to that received by other Powers.

Italy made her claim under favored nation article and received same reply from Mr. Bayard. U. S. For. Rel. 1886, p. 556–7.

Mr. Bayard in explaining the act of June 26, 1884, says: "It is to be observed that the act creates no national favor dependent upon the flag of the vessels to which it applies. A Swedish ship coming from a port in the defined Zone is treated the same as an American ship coming thence. It is quite apparent that considerations of propinquity may lead to, and indeed demand, special relationship between neighboring States, which from their nature are not susceptible of extension to distant regions where such considerations may not exist, and that an equivalence of reciprocal favor, *quam proxime*, however desirable, may be found impractical." Mr. Bayard to Mr. Macgee, U. S. For. Rel. 1885, p. 786.

Sweden claims she did not base her demand on favored nation clause, but on clause VIII, of treaty of 1783, which reads as follows: "The two high contracting parties engage not to impose upon the navigation between their respective territories in the vessels of either, any tonnage or other duty of any kind or denomination, which shall be higher or other than those which shall be imposed on every other navigation, except that which they have reserved to themselves respectively by the sixth article of the present treaty." (Coasting trade.) U. S. For. Rel. 1885, p. 791.

Mr. Reuterskiöld to Mr. Bayard.

Sweden and Norway continue to correspond concerning the act of 1884. The argument was:

1. That, by article 2 of treaty of 1783 and article 17 of treaty of 1827, most

purely geographical in character, inuring to the advantage of *any* vessel of *any* power that may choose to fetch and carry, between this port and any port embraced by the 14th section of the Act. I see no warrant, therefore, to

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favored nation treatment was guaranteed. By article 8, of treaty of 1827, no other or higher duties were to be imposed on the navigation of the contracting parties than imposed on every other navigation.

2. As navigation between the United Kingdom and Finland is expressly accepted in this treaty, it follows that no other navigation is accepted, and, consequently, vessels, whether Swedish or Norwegian or American, arriving from Swedish and Norwegian ports, have a right to the benefits of any reduction of tonnage or other dues which may be granted to vessels from any geographical point whatever.

3. Favored nation clause seems equally to demand a participation in the reduction, since merchants residing in the Zone, have advantages of cheaper rates than their competitors in other places enjoy. This is a favor.

4. If it is a favor, no matter if it is granted geographically, it remains, nevertheless, a favor to the countries in the Zone. Mr. Ehrensvärd to Mr. Reuterskiöld, For. Rel. 1887, p. 1041.

Mr. Bayard's answer:

1. Mr Ehrensvärd confounds "navigation" and "commerce." "Commerce concerns all transactions of property exchanged. Navigation relates solely to the means of carriage, without regard to the origin or ownership, or regulations imposed upon the things carried. Navigation is commonly synonymous with 'shipping' or 'carrying flags.'"

2. The eighth article (1827) relates solely to navigation, that is, to the marine flag.

3. The act of 1884 favors the flag of Sweden and Norway within the defined geographical limits, equally with that of the United States or of any other nation. So article eight has no application.

He fails to touch the commercial aspect of the situation beyond saying: "If this expansion of the text is justifiable, article eight of the treaty of 1827 has no application to the case now in view." Mr. Bayard to Mr. Reuterskiöld, F. R. 1887, p. 1043.

Sweden and Norway protested against excessive dues levied on commerce between them and the United States, and entered claim for privileges. Mr. Reuterskiöld transmitted to Mr. Bayard correspondence between Mr. Clay and Baron Stackleberg, Swedish and Norwegian *Chargé d' Affaires*, concerning tonnage dues levied on vessels arriving in Norway from different parts of the World, where different rates were charged according to the geographical districts or Zones. Ships were charged according to ports of departure.

1. Vessels from places outside of Europe, except Mediterranean,—highest rates.

2. Vessels from the Mediterranean,—medium rates.

3. Vessels from European ports,—lowest rates.

Baron Stackleberg argued in exactly the same way as Mr. Bayard, saying

claim that there is anything in the 'most favored nation' clause of the treaty between this country and the Powers mentioned that entitles them to have the privileges of the 14th section extended to their vessels sailing to this country from ports outside of the limitation of the Act." In a subsequent note to the representative of Sweden and

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there was no discrimination against the United States; their ships were treated just as Norwegian ships (*exercant la même navigation*) and that if America had lowest rates she would fare better than Norway.

Mr. Clay replied, April 28, 1828: "States situated remotely from each other labor under a great disadvantage in their commercial intercourse, from the space which separates them. It increases the charges on the objects of their commercial exchanges, and consequently lessens the mutual consumption of their respective commodities. Ought this advantage to be augmented by an increase of tonnage or any other duty? . . . It is difficult to conceive any language more explicit than that which is employed in the eighth article. . . . It leaves the parties but one inquiry to make, which is into the state of their respective laws imposing tonnage or other duties. . . . If it were necessary, the view now taken of the eighth article of the treaty might be forfeited by consideration drawn from other parts of the same instrument. It is stipulated, for example, in the ninth article, that no duties of any kind or denomination shall be levied upon a product of the soil or the industry of the respective countries, than such as are levied upon similar products of any other country. The object of this stipulation was to secure in the consumption of the respective countries an equality in their competition. But if a vessel laden with the produce of the United States is burdened on her entry into the ports of Norway with higher duties than a vessel laden with similar products and entering the same ports from any part of Europe, that equality is as much disturbed in effect as if the unequal imposition were directly upon the cargo, instead of the vehicle which transports it." F. R. 1887, pp. 1050, 1051.

This led to law of June 19, 1886, which, while not abolishing these dues, opened the door for the United States to give the same treatment to other countries.

In connection with this question, which really resolved into whether a tax on tonnage may become a tax on goods, see correspondence of F. R. 1887, between State department and Central America and Mexico on ship subsidy. A rebate of three per cent was allowed on goods imported by Spanish steamship line. It was claimed by the United States that this rebate acted as an unfair encouragement to navigation of this line (Spanish though carrying native flag) to the detriment of the United States' vessels. The United States objected to the subsidy as violating article six of treaty 1851 and favored nation clause of that treaty, and issued retaliatory orders from treasury to collect duties on Costa Rican vessels. Mr. Bayard to Senor Volio. F. R. 1888, p. 470.

Norway, he drew a distinction between "navigation" and "commerce" which he said had been confounded in the claims brought to his attention. Navigation he maintained related "solely to the means of carriage, without regard to the origin or ownership, or regulation imposed upon the things carried." It is true, as he implies, that navigation, does not include commerce, but he has ignored the fact that commerce on the other hand does include navigation and that any regulation concerning the latter is a regulation of commerce. To establish this, it is only necessary to inquire what was the object of the Act of June 26, 1884. It was unquestionably to secure closer trade relations between the United States and the countries situated within the geographical zone, and, by lowering the transportation charges on the latter's goods, to obtain for them a wider market in the United States. It was hoped that there would result from this improvement in the means of communication and more intimate trade relations an opportunity for American goods to undersell foreign competitors in the markets within the zone. The favor was given gratuitously,—there was no element of reciprocity in the transaction; and the nations who demanded its equal enjoyment by virtue of most favored nation treatment were entitled to the benefits of the Act. If this were not so, what would be the use of the most favored nation clause, or any other stipulation providing for fair and equal treatment in matters of commerce and navigation? If a nation can bestow gratuitous favors upon the navigation of such States as happen to lie within a certain geographical zone, she can, at will, contract or enlarge that zone. She can raise the tonnage tax on navigation from other places to prohibition, and thus confine her foreign commerce to certain specified districts, and can exclude the commerce of all nations without the zone, in violation of the formal conventions

that the latter should equally enjoy all privileges, favors and immunities in matters of commerce and navigation. The discriminating act was amended by law of June 19, 1886, which opened the door to the enjoyment of the zone favors to the ships of all countries upon terms of reciprocity.

Different from the tonnage tax, which is levied by a State in its sovereign capacity, are those charges imposed upon vessels for services rendered them while resorting to the ports of a foreign country. They include, among other things, fees exacted in the enforcement of quarantine and health regulations, pilotage, light dues, wharfage and charges for the use of artificial waterways. While these regulations are distinct from tonnage laws, so long as they apply to actual services rendered, they are, nevertheless, regulations of commerce, which fact requires that their enforcement shall be fair and impartial as between the vessels of different countries.

The power to enact and enforce quarantine regulations is derived from the acknowledged right of a State to provide for the health of its people, "and although this power when set in motion may in a greater or less degree affect commerce, yet the laws passed in the exercise of this power are not enacted for such an object," but for the sole purpose of preserving public health. In their operation on vessels they may produce delay or inconvenience,[1]

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[1] States have a right to enact and enforce quarantine regulations, but in levying a tax to pay for such services no tax in the shape of a tonnage tax can be levied.

"The source of this power is in the acknowledged right of a State to provide for the health of its people, and although this power when set in motion may in a greater or less degree affect commerce, yet the laws passed in the exercise of this power are not enacted for such an object. They are enacted for the sole purpose of preserving the public health, and if they injuriously affect commerce, Congress, under the power to regulate it, may control them. Of necessity, they operate on vessels engaged in commerce, and may produce delay or inconvenience, but they are still lawful when

but are still lawful as quarantine regulations so long as the charges for their enforcement are proportioned to the actual cost of the services rendered, and do not become a source of revenue to the State. There is no doubt of the service conferred upon a vessel by such regulations. It was clearly pointed out by the United States Supreme Court in *Morgan* v. *Louisiana*[1] "that the vessel itself has

not opposed to any Constitutional provision or any act of Congress on the subject." *Peete* v. *Morgan*, 19 Wallace, p. 581.

[1] "Nor is it denied that the enactment of quarantine laws is within the province of the States of the Union. Of all the elements of this quarantine system of the State of Louisiana, the only feature which is assailed as unconstitutional is that which requires that vessels which are examined at the quarantine station with respect to their sanitary condition and that of their passengers, shall pay the compensation which the law fixes for this service.

"This compensation is called a tonnage tax, forbidden by the Constitution of the United States; a regulation of commerce exclusively within the power of Congress; and also as a regulation which gives a preference to the ports of New Orleans over ports of other States.

"These are grave allegations with regard to the exercise of a power which, in all countries, and in all the ports of the United States, has been considered to be a part of, and incident to, the power to establish quarantine.

"We must examine into this proposition and see if anything in the Constitution sustains it. Is this requirement that each vessel shall pay the officer who examines it a fixed compensation for that service a tax? A tax is defined to be "a contribution imposed by Government on individuals for the service of the State." It is argued that a part of these treaties go into the treasury of the State or of the City, and it is therefore levied as part of the revenue of the State or City and for that purpose. But an examination of the Statute shows that the excess fees of this officer over his salary is paid into the City Treasury to constitute a fund wholly devoted to quarantine expenses, and that no part of it ever goes to defray the expenses, of the State or City Government.

"That the vessel itself has the primary and deepest interest in this examination, it is easy to see. It is obviously to her interest, in the pursuit of her business, that she enters the City and departs from it free from the suspicion which, at certain times, attaches to all vessels coming from the Gulf. This she obtains by the examination and can obtain in no other way. If the law did not make this provision for ascertaining her freedom from infection, it would be compelled to enact more stringent and more expensive penalties against the vessel herself, when it was found that she had come to the City from an infected port or had brought contagious persons or contagious matter with her; and throwing the responsibility for this on the vessel, the heaviest punishment would be necessary by fine and im-

the primary and deepest interest in this examination. . . . It is obviously to her interest, in the pursuit of her business, that she enters the City and departs from it free from the suspicion which attaches to all vessels coming from the Gulf. This she obtains by the examination and can obtain in no other way. If the law did not make this provision for ascertaining her freedom from infection, it would be compelled to enact more stringent and more expensive penalties against the vessel herself, when it was found that she had come to the City from an infected port or had brought contagious persons or contagious matter with her; and throwing the responsibility for this on the vessel, the heaviest punishment would be necessary by fine and imprisonment for any neglect of duty thus imposed. The State now says you must submit to this examination. If you appear free of objection, you are relieved by the officer's certificate of all responsibility on that subject. If you are in a condition dangerous to the public health, you are quarantined and relieved in this manner. For this examination and fumigation you must pay. The danger comes from you, and though it may turn out that in your case there is no danger, yet as you belong to a class from which all this kind of danger comes, you must pay for the examination which distinguishes you from others of that class."

While pilotage fees do not fall under the category of duties on imports and exports, and are distinct from tonnage dues, they are, nevertheless, charges upon a ship as a

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prisonment for any neglect of the duty thus imposed. The State now says you must submit to this examination. If you appear free of objection, you are relieved by the officer's certificate of all responsibility on that subject. If you are in a condition dangerous to the public health, you are quarantined and relieved in this matter. For this examination and fumigation you must pay. The danger comes from you, and though it may turn out that in your case there is no danger, yet as you belong to a class from which all this kind of injury comes, you must pay for the examination which distinguishes you from others from that class. . . .

carrier for services rendered, and, as such, are regulations of commerce.[1] "A pilot is as much a part of the commercial marine as the hull of the ship, and the helm by which it is guided; and half-pilotage as it is called, is a necessary and usual part of every system" of pilotage.[2] Half-pilotage refers to those fees which are exacted from a vessel refusing the proffered services of a pilot. They are looked upon as a necessary part of the system, for the knowledge that every vessel hailed by him must contribute to his income encourages the watchfulness of the pilot and acts as a reward for the hardships of his profession.

Lighthouses, buoys and beacons are important and sometimes necessary aids to the safe navigation of vessels.[3] They indicate the channels to be followed at the

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"In all cases of this kind it has been repeatedly held that, when the question is raised whether the State Statute is a just exercise of State power or is intended by roundabout means to invade the domain of federal authority, this Court will look into the operation and effect of the Statute." *Morgan* v. *Louisiana*, 118 U. S. p. 455.

[1] Action to recover pilotage fees. Held that pilotage fees did not fall under the category of duty on imports or exports.

"This provision of the constitution was intended to operate upon subjects actually existing and well understood when the constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage and from the laws and penalties by which commercial states enforced their pilot laws, as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes; and to declare that such pilotage fees or penalties, are embraced within the words imposts or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language." *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 Howard, 299.

However, pilotage charges do fall under the power to regulate navigation, and as navigation, by ruling of Court, falls under the power to regulate commerce, Congress has the right to prescribe rules for pilots and their charges, but the States, until Congress acts, have a right to establish such fees. *Ibid.*

[2] *Ex parte McNeil*, 13 Wallace, p. 236.

[3] *County of Mobile* v. *Kimball*, 102 U. S. p. 691.

entrances to harbors and rivers, and, along the coast, enable the mariner to set his course with safety. Their services are invaluable to commerce, but the charges which are imposed upon a ship which avails itself of their aid should be measured by the cost of their maintenance, and, by the operation of the most favored nation clause, should be fair and equal.

For the proper regulation of commerce it is often necessary for the State to regulate the time, place, and manner in which a ship may discharge its cargo and for convenience in these matters may establish wharves or piers and collect charges for the use of the same. "The character of the services is the same whether the wharf is built and offered for use by a State, or municipal corporation, or by a private individual, and, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of the right of property. A passing vessel may use the wharf or not at its election, and thus may incur liability for wharfage or not at the choice of the master or owner." It is like the claim for compensation for the use of a dry dock, or a demand for towage in a harbor, and may be graduated according to the size of the vessel. Conditions may be such that vessels are forbidden to discharge or unload cargo at places other than the designated wharf for the use of which they must pay, but this is no hindrance or impediment to free navigation. If, however, the tax is exacted from every vessel entering the port whether it uses the wharf or not, it would then become a tonnage tax, because the charge would not be for wharfage, or any service rendered, but for the privilege of stopping in the port.[1] The question whether fees which a vessel is re-

[1] "The principal question presented by the record of this case is, whether a municipal corporation of a State, having by the law of its organization an exclusive right to make wharfs, collect wharfage, and regulate wharf

quired to pay are to be classed as tonnage dues or charges for services rendered, is one, "not of intent, but of fact

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rates, can, consistently with the Constitution of the United States, charge and collect wharfage proportioned to the tonnage of vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharfs constructed on the banks of a navigable river.

"The City of Keokuk is such a corporation, existing by virtue of a special charter granted by the legislature of Iowa. To determine whether the charge prescribed by the ordinance in question is a duty of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. If the charge is clearly a duty, a tax, or burden, which in its essence is a contribution claim for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by the authority of the State, and measured by the capacity of the vessel, it is doubtless embraced by the Constitutional prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or duty that is prohibited; something imposed by virtue of sovereignty not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a State, a municipal corporation or a private individual, and, when compensation is demanded for the use of the wharf the demand is an assertion, not of sovereignty, but of right of property. A passing vessel may use the wharf or not at its election, and thus may incur liability for wharfage or not, at the choice of the master or owner. No one would claim that a demand of compensation for the use of a dry-dock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or of a State, and no matter whether proportioned or not to the size or tonnage of the vessel. There is no essential difference between such a demand and one for the use of a wharf. It has always been held that wharfage dues may he exacted; and it is believed that they have been collected in ports where wharfs have belonged to the State or municipal corporation ever since the adoption of the Constitution. In *Cannon* v. *New Orleans*, 20 Wallace, 577, this court, while holding an ordinance void that fixed dues upon steamboats which should moor or land in any part of the port of New Orleans, measured by the number of tons of the boats, because substantially a tax for the privilege of stopping in the port, and, therefore, a duty on tonnage, carefully guarded the right to exact wharfage. The language of the Court was: 'in saying this (namely, denying the validity of the ordinance then before it) we do not understand that this principle interposes any hin-

and law; of fact, whether the charge is imposed for the use of beacons, lights, wharfs, artificial waterways, etc., or for the privilege of entering a port; of law, whether it is wharfage, etc., or a duty of tonnage as the fact is shown to exist."[1]

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drance to the recovery from any vessel landing at a wharf or pier owned by an individual, or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation, to admit of a doubt, that for the use of such structures, erected by individual enterprise and recognized everywhere as private property, a reasonable compensation can be exacted. And it may safely be admitted, also, that it is within the power of the State to regulate this compensation so as to prevent extortion. . . . Nor do we see any reason why, when a City or any other municipality is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the City should not be allowed to exact and receive this reasonable compensation as well as individuals.'

"No doubt, neither a State nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted but the ordinances will always be carefully scrutinized. In *Cannon* v. *New Orleans*, the ordinance was held invalid, not because the charge was for wharfage, nor even because it was proportioned to the tonnage of the vessel, but because the charge was not for wharfage or any service rendered. It was for stopping in the harbor, though no wharf was used. Such also, was *Northwestern Packet Co.* v. *St. Paul*, 3 Dill. 454, so in *Steamship Company* v. *Port Warden*, 6 Wall. 31, the statute held void imposed a tax upon every ship entering the ports. This was held to be a like a regulation of commerce and a duty on tonnage. It was a sovereign exaction, not a charge for compensation. Of the same character was the tax held prohibited in *Peete* v. *Morgan*, 19 id. 581. . . . All these objections rest on the mistaken assumption that port charges, and especially wharfage are taxes, duties, and restraints of commerce." *Packet Company* v. *Keokuk*, 95 U. S. p. 80.

[1] Wharfage is the compensation which the owner of a wharf demands for the use thereof; a duty of tonnage is a charge for the privilege of entering, or loading at or lying in, a port or harbor, and can be laid only by the United States.

The question as to which of these classes, if either, a charge against the vessel or its owners belongs, is one, not of intent, but of fact and law; of fact, whether the charge is imposed for the use of a wharf, or for the privilege of entering a port; of law, whether it is wharfage or a duty of tonnage as the fact is shown to exist.

Although wharfs are related to commerce and navigation as aids and conveniences, yet being local in their nature, and requiring special regulations at particular places, the jurisdiction and control thereof, in the ab-

A State may also prescribe regulations for the government of vessels within its harbors, designating the places at which they shall be moored, the lights to be carried by them, and the time at which they may use the wharfs and docks. "It may appoint officers to see that they are carried out, and impose penalties for refusing to obey the direction of said officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations." The authority for such rules is found "in the right and duty of the supreme power of the State to provide for the safety, convenient use, and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered compensation for facilities thus furnished to vessels." [1]

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sence of Congressional legislation on the subject, properly belong to the States in which they are secured.

"Exorbitant wharfage may have a similar effect as a burden on commerce as a duty of tonnage has; but it is exorbitant wharfage, and not a duty of tonnage; and the remedy for the one is not the remedy for the other." *Transportation Co.* v. *Parkersburg*, 107 U. S. p. 691.

[1] "The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, and by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls, rest upon a different principle. A tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters. *Kellog* v. *Union Co.*, 12 Conn. 7; *Thames Bank* v. *Lovell*, 18 Conn. 500; *McReynolds* v. *Smallhouse*, 8 Bush, 447.

"Upon similar grounds what are termed harbor dues or port charges, exacted by the State from vessels in its harbors, or from their owners for other than sanitary purposes, are sustained. We say for other than sanitary purposes; for the power to prescribe regulations to protect the health of the community and prevent the spread of disease, is incident to all municipal authority, however much such regulations may interfere with the movements of Congress. But, independently of such measures, the State may prescribe regulations for the government of vessels while in its harbor; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharfs at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharfs when not thus engaged so as to make room for other vessels.

A tonnage due above described as a charge for the privilege of entering, lying in, loading and unloading in a foreign port, refers to rivers and harbors in their natural state, and the privilege thus secured does not entitle the

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It may appoint officers to see that the regulations are carried and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for facilities thus furnished to vessels.

"The ferry boats of the company are registered at the port of Camden in New Jersey, and according to the decisions in *Hays* v. *The Pacific Mail Steamship Co.*, and in *Morgan* v. *Parham*, they can be taxed only at their home port.

"While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with the like property of a domestic corporation engaged in that business, we are clear that a tax or burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transporation is made, is invalid and void as an interference with, and an obstruction of Congress in the regulation of such commerce." *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. p. 196.

"There can be no doubt that the rules which govern the landing and departure of vessels at points situated on navigable waters may seriously affect them in their business of navigation and transportation, and in some sense such rules are regulations of commerce.

"On the other hand, the necessity is obvious of the existence in each port, where vessels as large as steamboats land at the shore and deposit their cargoes on the banks of navigable streams, of some authority to prescribe the places where this may be done, the time of doing it, and the points at which they may discharge cargo, both as relates to streets, shores, houses of the town, and other vessels landing at the same time.

"The protection of the shore of the sea or bank of a river on which a town is situated is a necessity to the town, and the washing and crumbling of the bank from the agitation of the water, made by the landing of large steamers, demand that such regulation should exist." *Packet Company* v. *Catlettsburg*, 105 U. S. p. 559.

"There the city authorities of Charleston had passed an ordinance prescribing where a vessel should lie in the harbor, what light she should show at night, and making other similar regulations. It was objected that these requirements were regulations of commerce, and, therefore, void. The Court affirmed the validity of the ordiuance." *The Brig James Gray* v.

vessel to the free use of artificial waterways such as canals and locks which a State may have constructed within its borders at great expense. These additional facilities or aids to navigation can be availed of only upon compensation, and even if a charge should be based upon the carrying capacity of the vessel, it would not on that account become a tonnage tax.[1] The essential facts are that the charge is for a service, and that it is impartially levied.[2]

The Ship John Fraser, 12 Howard, p. 184, confirmed in *Railroad Company* v. *Fuller*, 17 Wallace, p. 560, where railroad companies were obliged to publish tariffs and to adhere to them. The two foregoing cases relate to police rights.

[1] "The provision in the ordinance of 1787, that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways forever, free, without tax, impost or duty therefor, refers to rivers in their natural state, and does not prevent the State of Illinois from improving the navigation of such waters within its limits or from charging and collecting reasonable tolls from vessels using the artificial improvements as a compensation for the use of those facilities.

"If, in the opinion of a State, its commerce will be more benefited by improving a navigable stream within its borders, than by leaving the same in its natural state, it may authorize the improvement, although increased inconvenience and expense may thereby attend the business of individuals."

"Nor is there anything in the objection that the rates of toll are prescribed by the commissioners according to the tonnage of the vessels, and the amount of freight carried by them through the locks. This is simply a mode of fixing the rate according to the size of the vessel and the amount of property it carries, and in no sense is a duty of tonnage within the prohibition of the Constitution. A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country. . . . It is a tax or duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. . . . They are not the same thing; a duty of tonnage is a charge for the privilege of entering, or trading or lying in, a port or harbor; wharfage is the charge for the use of a wharf. . . . The fact that the rates of wharfage charged are graduated by the size or tonnage of the vessel is of no consequence in this connection. *Huse* v *Glover*, 119 U. S. p. 543.

[2] Held that if a State makes a heavier charge upon vessels discharging foreign merchandise than those discharging native produce, the statute is void as imposing a tax on imports. *Vicksburg* v. *Tobin*, 100 U. S. p. 434.

Commerce consists of intercourse as well as traffic, and includes the transportation of persons and property. The business of receiving and landing passengers and freight is incident to their transportation, and a tax upon such receiving and landing is a tax upon transportation and upon commerce.[1] On this ground it has been held that if a State makes a heavier charge upon vessels discharging foreign merchandise than those discharging native produce, the excess is a duty on imports. By analogy a tax upon a ship owner for the landing of his passengers is a regulation of commerce, and the commerce and navigation of a foreign country may suffer as well through taxes imposed upon the landing of passengers as upon the discharging of goods. The Supreme Court of the United States has held that the "transportation of a passenger from Liverpool to New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, a regulation of commerce with foreign nations."[2]

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[1] *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. p. 196.

[2] Hence a statute which imposes a burdensome and almost impossible condition on the ship master as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each one of them, is a tax on the ship-owner. For the right to land such passengers, and, in effect, on the passenger himself, since the ship master makes him pay it in advance as a part of his fare.

Such a statute of a State is a regulation of commerce, and when applied to passengers from foreign countries, is a regulation of commerce with foreign nations.

Opinion:

"As already indicated, the provisions of the Constitution of the United States, on which the principal reliance is placed to make void the Statute of New York, is that it gives to Congress the power 'to regulate commerce with foreign nations.' As it was said in *U. S.* v. *Holliday*, 3 Wallace, 417,

After the payment of the tonnage tax and duties on imports and exports, the only interference by a State with the landing and receiving of passengers or freight arriving by vessels from a foreign country which is usually imposed, is confined to measures to prevent confusion among the vessels, collisions between them, to insure their safety and convenience, and to facilitate the discharge and receipt of their passengers and freight.[1] This rule, however, is subject to the general police powers of the State which determine what classes of persons and what character of goods shall be admitted within its borders.

'Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign Government.' It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. 'The mind,—says the Great Chief Justice—can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;' and he might have added with equal force, which prescribed no terms for the admission of their cargo or their passengers. The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations." *Henderson et al.* v. *Mayor of New York et al.*, 92 U. S. p. 259. Same decision in *Chy Lung* v. *Freeman et al.*, 92 U. S. p. 275.

[1] Freedom of transportation between the States, or between the United States and foreign countries, implies exemption from charges other than such as are imposed by way of compensation for the use of property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. p. 196.

CHAPTER VIII.

In the transportation of articles of commerce, the railroad occupies the same position on land as the vessel does at sea. As the means of intercourse, its business is commerce, and its employment is necessary to every merchant engaged in extensive operations of foreign trade.[1] The increase in ownership of railroads by States has led to the insertion in a number of treaties of commerce of a clause providing for fair treatment in the matter of railway tariffs on imports and exports.[2] While this is an additional precaution and doubly safeguards the commercial rights of the contracting parties, it is doubtful from the point of view of most favored nation treatment, if such special stipulations are necessary. Intercourse is as much a part of commerce as traffic, and a regulation of intercourse is a regulation of commerce. A nation therefore enjoying the privileges of most favored nation treatment in matters of commerce can justly claim upon terms of reciprocity rates as low as those extended under

[1] "Nor does it make any difference whether this interchange of commodities is by land or water, (see Passenger Case). In either case the bringing of the goods from the seller to the buyer is commerce." *Case of the State Freight Tax*, 15 Wallace, p. 232.

[2] "The increase in ownership of railroads by the States of Europe has rendered necessary a new clause in commercial treaties. The adjustment by the Government of railway transportation tariffs has become of like importance to the adjustment of the tariffs upon the importation of merchandise. The acquisition of trunk lines of railway by Prussia has given to that Government an important influence over the foreign commerce of Austria-Hungary, much of which finds inlet and outlet across Germany." Mr. Kasson to Mr. Evarts, U. S. For. Rel. 1880, p. 48.

like conditions to any other nation. There is a difference, however, between excessive railroad charges and a tax upon exports and imports; and the remedy for one is not the remedy for the other. If a greater charge is made on the transportation of goods of foreign origin or destination than on like articles of native production when the railroad performs the same service for both, the charge would act as a duty upon imports and exports, and a return of the excess charges can be claimed under the special treaty stipulation providing for duties on imports and exports. Discriminations otherwise imposed fall under the broader and more general clause of the most favored nation.

The post, the telegraph and the telephone are established to facilitate the transmission of intelligence and are necessary instruments to commercial transactions.[1] They are the carriers of messages as the railroad and the ship are carriers of goods, and are so indispensable to those engaged to any considerable extent in commercial pursuits,[2] that charges for their use are charges upon commerce for the services rendered it. The United States Supreme Court has said of the telegraph, "The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-com-

[1] "Now, we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between States, is commerce among the several States. . . ." *Leloup* v. *Port of Mobile*, 127 U. S. p. 640.

[2] "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportations in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits." *Telegraph Co.* v. *Texas*, 105 U. S. p. 460.

munication but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than 80 per cent of all the messages sent by telegraph relate to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information."[1] These remarks apply in their entirety to the post and the telephone.

The secondary instruments of commerce are those necessary for the protection of the goods and merchandise in transit from the country of their origin to the foreign market, and to secure payment for them when delivered to the purchaser. Generally speaking, they are the bill of lading, and the bill of exchange. The bill of lading is most intimately associated with the goods to which it refers, so intimately in fact, that a tax upon the bill is a tax upon the goods. In *Almy* v. *The State of California*[2] it was held that: "A tax or duty on a bill of lading, although differing in form from the duty on an article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from parts of one country to those of another. The necessities of commerce require it. It is hardly less necessary to the existence of such commerce than casks to cover tobacco or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of the ship-master, without taking written evidence of its receipt on board the vessel,

[1] *Pensacola Telegraph Co.* v. *Western, etc., Telegraph Co.*, 96 U. S. p. 1.
[2] 24 Howard, p. 169, affirmed by the same court in April, 1901.

and the purposes for which it was placed in his hands." The bill of exchange does not relate so particularly to imports and exports, and a tax upon the bill could not be called a tax upon the goods whose value it represents. It is, however, a necessary instrument to commerce and a fair use of it is secured by the provisions of the most favored nation clause, provided the citizens or subjects of another foreign State are permitted to employ it.

CHAPTER IX.

All commercial transactions are conducted subject to the police and inspection laws of the State where they take place. These laws are justified by the application of the maxim, *salus populi suprema lex*,[1] which demands the enactment of legislation necessary for the protection of the lives, health and property of the citizens or subjects and to the preservation of good order and public morals.[2] A police regulation may apply to individuals, their occupation and their property, while an inspection law deals only with goods and merchandise. By virtue of its police power every State possesses the right to determine who shall compose its members, and may exclude from its boundaries all persons whose presence is deemed prejudicial to the public welfare, such as criminals, paupers,

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[1] "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." *Beer Company* v. *Massachusetts*, 97 U. S. p. 25.

[2] "In expressing these views, we have no purpose to impugn anything heretofore said by the Court as to the power of the States to establish inspection, quarantine, health, and other regulations, within the sphere of their acknowledged authority. The Constitutional validity of such regulations is as clear as the power of Congress to establish regulations of commerce. It is no objection to the former that both operate upon the same subject." *Foster* v. *Master, etc., of New Orleans*, 94 U. S. p. 246.

diseased persons, or, in fact, any persons whose living or sojourning within the boundaries of the State, might disturb its tranquillity[1]. By the same authority it regulates the professions, occupations and callings of its inhabitants. "The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society; when the calling, profession and business of parties, is unattended with danger to others, little legislation will be necessary respecting them. Thus, in the sale and purchase of most articles of general use, persons may be left to exercise their own good sense and judgment; but when the calling or profession or business is attended with danger or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. Thus, if one is engaged in the manufacture or sale of explosives or inflammable articles or in the preparation or sale of medicinal drugs, legislation, for the security of society, may prescribe the terms on which he will be allowed to carry on the business and the liabilities he will incur from neglecting them."[2] Police regulations may forbid the introduction and sale of goods and merchandise prejudicial to the health, morals and safety of the people, and inspection laws serve to determine whether or not the goods belong to the forbidden class. It has been said "that the recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds—all these matters being supervised by a public officer having author-

[1] Every State possesses the right to determine who shall compose its members and it is exercised by all nations, both in war and peace. *Fong Yue Ting* v. *U. S.*, 149 U. S. 698. Also Vattel lib. 1, c. 19, secs. 230–231; Ortolan Dip. de la Mer. lib. 2, c. 14, p. 297; Phillimore's Int. Law (3d ed.), c. 19, sec. 220.

[2] *Minneapolis Railroad Co.* v. *Beckwith*, 129 U. S. p. 26.

ity to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary and it is manifestly not necessary, that all of these elements should co-exist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirements, or the inspection may be made to extend to all of the above matters."[1] Police laws may and should

[1] "As was said in *Turner* v. *Maryland*, 107 U. S. 38, 55: 'Recognized elements of inspection laws have always been—quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds—all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, if it did not answer the prescribed requirements. It has never been regarded as necessary and it is manifestly not necessary, that all of these elements should co-exist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirements or the inspection may be made to extend to all of the above matters.' It has never been regarded as within a legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequence of its use or abuse.

"For similar reasons, the Statute of Iowa under consideration cannot be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of a community, or a law to prevent the introduction into the State of disease, contagious, infectious or otherwise. Doubtless the States have power to provide by law suitable measures to prevent the introduction into the State of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence and death, such as rags or other substances infected with the germs of yellow fever or the virus of small pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable, they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightly exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. *The License Cases*, 5 How. 504–599, are very much to the point, . . . and the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce or of commerce among the States. If, from its nature, it does not belong to commerce, if its condition, from putrescence or other cause is such, when it is about to enter the State,

exclude from the territory of the State all articles which are *per se*, noxious to public health or morals. In this

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that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power, that is to say, that which does not belong to commerce is within the police power of the jurisdiction of the State; and that which does belong to commerce is within the jurisdiction of the United States. . . . 'The object of inspection laws' said Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 'is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be for domestic use. They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose.' They are confined to such particulars as, in the estimation of the legislature, and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use and consumption. They are not founded on the idea that the things, in respect to which inspection is required, are dangerous or noxious in themselves. . . . It may be said, however, that the right of the State to restrict or prohibit sales of intoxicating liquor within its limits conceded to exist as a part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as is conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are things within its jurisdiction. Its power over them, does not begin to operate until they are brought within a territorial limit which circumscribe it. . . . It is enough to say, that the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State."

Dissenting opinion:

"In *Brown* v. *Maryland* it was insisted that the Constitutional prohibition of State imposts or duties on imports ceased the instant the goods entered the country; otherwise, it was argued, the importer may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which injure the public health, and the power of self-preservation is denied." To this argument Chief Justice Marshall replied: "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the State. If the possessor himself stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is

category belongs diseased meats, rags infected with disease and obscene books and pictures. Such articles from their condition and quality are unfit for human use and consumption; they are not merchantable nor legitimate subjects of trade and commerce. "They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health, life" and morals; and the regulations excluding them cannot be considered regulations of commerce. While the police power of the State may with fairness impose such restrictions as are necessary upon the sale of any commodity within its borders "it has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any article of commerce irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse." Thus alcoholic liquors, opium and other drugs may, through their abuse, prove injurious to a people, and a State has a perfect right to control their sale and possession. Thus far such regulations do not concern commerce, but a sweeping order forbidding their introduction into the State as imports takes the form of a commercial regulation.[1] The test of a police regulation

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because he stores it there, in his opinion, more advantageously than elsewhere. (Chief Justice Wait, Justice Harlan and Justice Gray dissented.)" *Bowman* v. *Chicago, etc., Railway Co.*, 125 U. S. p. 465. (There seems no doubt that the State in exercise of its police power may supervise or prohibit the sale of an article or the possession of such article if injurious to public health or morals, and may even seize such articles at the borders of the State. The difficulty arises in determining what is a dangerous, noxious or offensive article. The above case shows the Court could not agree on the question of alcoholic liquors.)

[1] "The Court decided that a State has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said State, to inflict penalties for such manufacture and sale, and to provide regulations for the abatement of a common nuisance of property used for such forbidden purposes; and that such legislation by a State is a clear exercise of her undisputed police power."

or an inspection law lies in its object and in the uniformity with which it is applied. It should have for its object the preservation of the life, health and morals of the people, to prevent their being imposed upon by adulterated, counterfeit[1] or fictitious articles, or articles underweight or undermeasure, and should apply equally to domestic goods and those of foreign origin.[2]

(Court held in this case that the State could not prevent the importation into that State nor the sale therein by persons outside thereof of intoxicating liquors in the original packages and in sufficient quantities to make them fall under the head of interstate or foreign commerce. In all these cases a careful distinction must be made between the right of the police power to seize or prohibit the sale of articles noxious, *per se*, and those which are only harmful through abuse or improper handling.) *Kidd* v. *Pearson*, 128 U. S. p. 1.

While a State may enact sanitary laws, and for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the State, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory. *Railroad Company* v. *Husen*, 95 U. S. p. 465.

[1] Police laws may prevent the sale of an article under a false name, *i. e.* oleomargarine as butter. *Plumley* v. *Massachusetts*, 155 U. S. p. 461.

[2] Inspection laws must not in their enforcement or objects discriminate unfavorably against goods of other States. *Brimmer* v. *Redman*, 138 U. S. p. 78.

A law providing for inspection of animals, whose meats are designed for human food, cannot be regarded as a rightful exertion of the police power of the State, if the inspection was of such a character, or is burdened with such conditions, as will prevent the introduction into the State of sound meat, the product of animals slaughtered in another State. *Minnesota* v. *Barber*, 136 U. S. p. 314.

A tax imposed by a State upon an occupation, which necessarily discriminates against the introduction and sale of the products of another State is repugnant to the Constitution of the United States.

A police power of a State to regulate the sale of intoxicating liquors and preserve the public health and morals does not warrant the enactment of laws infringing positive provisions of the Constitution of the United States.

A State Statute which imposes a tax upon persons who, not residing or having their principal place of business within the State, engage there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without it, but does not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the State, is a regulation in restraint of commerce, and repugnant to the Constitution of the United States. *Walling* v. *Michigan*, 116 U. S. p. 446.

CHAPTER X.

The general clause of the most favored nation does not comprehend special engagements of reciprocity. It sometimes happens that States owing to propinquity, or to some exceptional condition in their international commercial relations, enter into special arrangements founded upon mutual concession.[1] The essence of these special

[1] The provisions in the treaty of friendship, commerce and navigation with the King of Denmark, concluded April 26, 1826, and revived by the Convention of April 11, 1857, do not, by their own operation, authorize the importation, duty free, from Danish dominions, of articles made duty free, by the Convention of January 30, 1875, with the King of the Hawaiian Islands, but otherwise subject to duty by a law of Congress, the King of Denmark not having allowed to the United States the compensation for the concession which was allowed by the King of the Hawaiian Islands.

Opinion:

Treaty by article 1, declares any particular favor to other nations shall immediately become common to the other party, who shall enjoy the same freely if freely made and upon allowing the same compensation if conditional. Article 4 declares "No other or higher duties . . ." (British clause).

"These stipulations, even if conceded to be self executed by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that in the imposition of duties on goods, imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual, for reciprocal advantages. 'No higher or other duties' were to be imposed by either upon goods specified; but if any particular favor should be granted by either to other countries in respect to commerce and navigation, the concession was to become common

treaties of reciprocity, and the reason that the favors extended by them cannot be enjoyed under the most favored nation clause, is that the equivalents given for the privileges secured are exceptional,—the like of which no other State can offer. If the equivalent or its like can be, and is offered by another State, then the engagement loses its character as special, and the favor for which the equivalent was given, must be extended upon equal terms to other nations entitled to favored nation treatment. It is not sufficient that one State says to another, "if you grant me an advantage over all other nations in your market I will give you a corresponding advantage in mine," for this is just what the favored nation clause is intended to prevent, namely, unfair discrimination. On the other hand, where these treaties incorporate a number of mutual concessions, it is not fair to say that a concession on one particular point was in consideration of an advantage in one particular subject granted by the other party. The sum of the concessions granted on one side must be taken as the consideration for the total of the favors obtained from the other. It will be difficult to prove the special character of a treaty of reciprocity involving only mutual concessions in matters of commerce and navigation unless the contracting States are closely allied either geographically or politically. Where a State has by special treaty of reciprocity granted favors in matters in commerce and navigation, it should in justice grant to every other power with which it has treaty relations, an opportunity by negotiation to arrive at what would be a fair equivalent for the favors extended by the special treaty.

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duty to the other party upon like consideration, that is, it was to be enjoyed freely if the concession were freely made or on allowing the same compensation if the concession were conditional." *Bartram* v. *Roberts*, 122 U. S. p. 116.

The first offer to enter into special engagements of reciprocity received by the United States was tendered by Denmark on behalf of her possessions in the West Indies.[1] The proposition included a plan for mutual concessions in the matters of duties on imports and was refused by the United States because "the course of policy which has been invariably pursued by the United States in their commercial intercourse with foreign nations, and for a departure from which their Government can, at this time, discover no adequate cause, even if existing and imperative obligations did not put it out of their power to do so, has been to extend equal privileges to all nations who consent to reciprocate them with the United States; and their legislation has been uniformly predicated on that principle."

The negotiations which terminated in the reciprocity treaty between Great Britain and the United States of June 5, 1854, providing for mutual concessions in the trade between the United States and Canada, disclose an understanding on the part of Great Britain, that such special engagements are permissible. Mr. Crampton,

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[1] "These motives have their source in the treaties now in force between the United States and other nations, by virtue of which the productions of all of them, without distinction, are admitted into our ports upon the payment of equal duties, and, in all other respects, upon equal conditions. These stipulations put it out of the power of this Government to make any exception in that regard, in favor of the possessions of His Danish Majesty." Mr. Van Buren, Sec. of State, to General Von Scholten, November 29, 1830 (a reply to Denmark's proposal for an extension of article 6, of treaty of 1826). Ho. Ex. Doc. 21st Con. p. 10, 2d Sess.

(It is questionable if more stress is not laid on uniformity of duties, as shown below.)

"The course of policy which has been invariably pursued by the United States, in their commercial intercourse with foreign nations, and for a departure from which their Government can, at this time, discover no adequate cause, even if existing and imperative obligations did not put it out of their power to do so, has been to extend equal privileges to all nations who consent to reciprocate them with the United States; and their legislation has been uniformly predicated upon that principle." *Ibid.*

the British Chargé d' Affaires at Washington, under instructions from his Government, addressed the American Secretary of State as follows: "It has been objected that, if certain agricultural articles (more particularly wheat) the productions of Canada, were admitted free of duty into the United States, under a convention with the British Government, for a reciprocal free trade between that province and the United States in such productions, the like productions of other nations having "reciprocity treaties" of commerce with the United States, must be admitted on the same terms. . . . Had any other nation, a colony similarly situated, she might then be borne out in claiming that such colony should be equally favored; otherwise not."[1] He also called attention to the fact

[1] Mr. Crampton, British Chargé d'Affaires at Washington, under instructions from his Government, proposed, in a note to Mr. Clayton, March 22, 1849, a scheme for reciprocal free trade in natural products between the United States and Canada. Mr. Crampton's memorandum accompanying his notes reads as follows: "It has been objected that, if certain agricultural articles (more particularly wheat), the productions of Canada, were admitted free of duty into the United States, under a convention with the British Government, for a reciprocal free trade between that province and the United States in such productions, the like productions of other nations having 'reciprocity treaties' of commerce with the United States must be admitted on the same terms.

"To this it may be replied, that no nation could claim for itself an advantage, under a convention between Great Britain and the United States, which Great Britain had not obtained under that convention. Had any other nation a colony similarly situated, she might then be borne out in claiming that such colony should be equally favored; otherwise not.

"A precedent has already been established which involves this principle, and makes a distinction between an inland colony and an independent State. An Act passed in the British Parliament in 1825 (the 6th George IV, chapter 13, clause 32), enacts that the same tonnage duties shall be paid on American vessels importing goods into either province of Canada, by the inland waters, as are or may be for the time being payable in the United States on British vessels. In the year 1831, the United States passed 'an act to regulate foreign trade on the Northeast and Northwest Boundary,' (chapter 98, March, 1831), remitting all fees on British vessels entering their ports on that boundary; consequently, up to the present moment, no fees are exacted there on either side, whereas they still exist in the Atlantic ports on all foreign vessels." Ho. Ex. Doc. 64, 31st Con., 1st Sess.

that a precedent involving this principle had been established, namely, Act of Parliament, 6 George IV, chapter 13, clause 32, which, upon terms of reciprocity, gave special concessions to American vessels in the inland waters of Canada.

The next treaty of reciprocity entered into by the United States was that with Hawaii, dated January 30, 1875. It was founded upon mutual concessions in duties on imports,—the productions of the respective countries—and raised a perplexing question involving the commercial relations between Hawaii and Great Britain. In consideration of the admission duty free in ports of the United States of her natural products, Hawaii agreed to admit duty free in her own ports certain articles, the produce and manufacture of the United States, and stipulated further that the like articles, the productions or manufacture of any other nation, should not be duty free, and that she would not lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in her dominions, or grant any special privilege or rights of use therein to any other power. It will be seen by an examination of this treaty, that no other power could offer to the United States the equivalent granted her by Hawaii, which included not only freedom for her products and manufactures, but the leasing of a port in the Hawaiian Islands. Hawaii on the other hand had gained as a con-

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Mr. Merritt, Canadian Commissioner, gave the same views. *Ibid.*

In a note from Mr. Clayton to Mr. Crampton, the Secretary of State quoted the necessity of referring the question to Parliament, and said the United States Executive likewise feels that as tariff is a prerogative of Congress, it had best be left to the legislative branch of the Government, and that no treaty or convention regulating tariff will be considered by the Executive. *Ibid.*

Sir Henry Bulwer to Mr. Webster, June 24, 1851, offered to the United States the free navigation of the waters of the St. Lawrence, the canals and trade with all British North American Colonies on basis of reciprocity. Sen. Ex. Doc. 1, 32d Con. 1st Sess.

cession from the United States the free admission of her products only. Great Britain, relying upon a clause in her treaty with Hawaii which provided that no other or higher duties should be charged upon her goods when entering the ports of the latter country than were charged upon the like goods of other nations, demanded for her exports the same treatment that was secured to like goods, the products of the United States. Hawaii could not meet this demand, for she had bound herself by treaty with the United States not to admit the goods of any other country free of duty, and was compelled to denounce the clauses in the British treaty under which Great Britain had made her claim. As, however, the treaty by its own terms did not terminate until one year after notice given, Great Britain brought a claim for the payment of what she termed excessive duties collected during this period which were denied by Hawaii.[1]

While not brought into direct issue in the case last cited, owing to the peculiar political and geographical

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[1] 1. Immediately after the American treaty came into operation, the British representative at Honolulu notified Hawaii that "Her Majesty's Government cannot allow" any discrimination against British products in favor of American.

The British Government insisting upon its claim, the Hawaiian Government gave one year's notice (under the 17th article of its treaty with Great Britain), terminating the 4th, 5th, and 6th articles of the Anglo-Hawaiian treaty of 1851–2.

3. This action was resented as "unfriendly."

4. In London, Lord Derby informed Mr. Carter, Hawaiian Commissioner, that Great Britain would drop the controversy if Hawaii would withdraw its denunciation of the articles referred to in section 2, and would attach the American free schedule to an agreement not to tax the articles therein enumerated when British, more than 10 per cent.

5. The notice of denunciation was withdrawn as to all except first paragraph of both articles.

6. Hawiian tariff was amended substantially as proposed by Lord Derby (10 per cent *ad valorem* horizontal). It was supposed this would end the British claim.

7. Great Britain claimed for importers a refund of duties paid during the period of termination of the treaty.

position of Hawaii, and the special character of the treaty of 1875, the question has sometimes been raised whether or not a nation that through the policy of free trade imposes no duties on imports, is entitled by favored nation treatment to all the benefits of a treaty of reciprocity founded solely upon mutual concessions in the exchange of articles of commerce. It seems only fair that she be, for she has not only conceded the equivalents, but has done so in advance of the nation that has bought the favor.

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8. Hawaii insisted that importers had their remedy in the Courts of the country.

9. British Representatives demanded action on the part of the Executive to refund duties.

Mr. Comly to Mr. Blaine, For. Rel. 1881, p. 622.

At this stage Mr. Blaine instructed Mr. Comly: "The treaty was made at the continuous and urgent request of the Hawaiian Government. It was, as it was intended to be, an evidence of the friendship of the United States, and was shaped by a large and liberal disposition on our part to consult the wishes and interests of the Hawaiian Government. As you are aware, there was much opposition to some of its concessions by some of our own citizens, whose capital was employed in certain agricultural industries. The term of the treaty was limited in order that both parties might obtain practical experience of its operation, and in order to secure the experiment from possible disturbance, it was expressly stipulated. . . .

"It would be an unnecessary waste of time and argument to undertake an elaborate demonstration of a proposition so obvious as that the extension of the privileges of this treaty to other nations under a 'most favored nation' clause in existing treaties, would be as flagrant a violation of the explicit stipulations as a specific treaty making the concession.

"You are instructed to say to the Hawaiian Government that the Government of the United States considers this stipulation as the very essence of the treaty, and cannot consent to its abrogation or modification directly or indirectly. . . . From your history of the controversy, I find it difficult to understand how Her Britannic Majesty's Government can consistently maintain a right for the settlement of any claim for the difference in duty imposed under the British treaties and under the treaty with the United States. . . . In event, therefore, that a judicial construction of the treaty should annul the privileges stipulated, and be carried into practical execution, this Government would have no alternative and would be compelled to consider such action as the violation by the Hawaiian Government of the expressed terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling." Mr Blaine to Mr. Comly, For. Rel. 1881, p. 624.

By Act of Congress of October 1, 1890, certain articles were made free of duty (sugar, molasses, coffee, hides, etc.); but whenever the President became satisfied that reciprocal favors were not granted to the products of the United States in the countries producing these articles, it was made his duty to impose upon the latter certain import duties. The advantages of this act were availed of by nearly all countries producing the articles in question.[1] The Government of Austria-Hungary took the position of willingness to grant "such reductions of duties as have been or may hereafter be granted to other States by commercial treaties, as far as such reductions are applicable to our countries enjoying usage of the most favored nation, to similar productions from the United States." The offer of Austria-Hungary was accepted by Mr. Blaine as satisfactory.[2]

[1] Under section three of that tariff law, Brazil, Dominican Republic, Spain for Cuba, and Puerto-Guatemala, Salvador, German Empire, Great Britian for certain West India Colonies and British Guinea, Nicaragua, Honduras, and Austria-Hungary received favorable treatment. Annual Message President Harrison, U. S. For. Rel. 1892, p. IX.

[2] "The Austro-Hungarian Government is consequently prepared to grant such reduction of duties as have been or may hereafter be granted to other States by commercial treaties, as far as such reductions are applicable to our countries enjoying usage of the most favored nation, to similar productions from the United States." Mr. Tavera to Mr. Blaine, Sen. Ex. Doc. 119, 52d Con. 1st Sess.

The representative of Colombia protested against the action of the President enforcing discriminating duties against the products of the former country. Under the act of October 1, 1890, certain articles were admitted free of duty, but if the President deemed the duties of any other country reciprocally unequal, it was his duty to suspend these free duties. After a long delay in attempting to negotiate an arrangement with Colombia, the President, by proclamation of March 15, 1892, suspended the free list on Colombian goods, *i. e.*, sugars, molasses, coffee, tea and hides. Colombia protested that such action was in violation of the favored nation clause in her treaty, inasmuch as Mexico and the Argentine Republic were gratuitously enjoying these favors.

The United States replied that negotiations were pending with these powers. U. S. For. Rel. 1894, Appendix I, p. 451 and following. (Not a good answer and unfair to Colombia. All nations should be treated the same and the countervailing act should apply to all at the same time.)

CHAPTER XI.

Arising through Act of Congress of August 28, 1894, the question of the right of a State to levy a discriminating duty upon the product of a country that encourages its exports by a bounty, has assumed considerable importance. Such a tax a Government will probably hold fair or unfair, according to its policy in trade. Where free trade is the policy the tax will doubtless fall; by the doctrines of protection it will be sustained. The principles of free trade teach that the geographical boundaries of a country are, for the purposes of commerce, only imaginary; that no restrictions should be placed upon the importation of any article which is of use to the people; and that it is to their advantage to obtain for their consumption articles wherever produced at the lowest possible price. If another nation chooses to grant a bounty on the export of its productions and thus give them wider sale, this bounty is to the advantage of the purchaser in that it cheapens the articles consumed by him. The protectionists on the other hand advocate the encouragement of home industry and erect custom barriers to prevent undue competition between domestic and foreign products and manufactures, to the detriment of the former, and, for this purpose, impose protective duties.

Their policy is to give protection to the native producers and manufacturers and the usual means employed for this purpose, is the import duty. The object of the bounty is to enable the producer to sell at a lower cost

when coming in competition with the foreign producer of the same article, and it may be fairly said that it enables the former to evade the import duties of other countries in so far as they are established to protect home industries. A tax, therefore, upon a bounty product equal to the unnatural advantage which it enjoys is justifiable.[1] It was said by Mr. Gresham in a report advocating the abolition of the tax that if a discriminating tax upon a bounty article was justifiable, by analogy, a similar tax upon an article produced under protective tariff laws was likewise justifiable; and that the bounty and the protective tariff were but different means for arriving at the same end, namely, an encouragement of home industries. A protectionist might well reply that this is true, and that there is no international law or regulation forbidding a discriminating tax upon articles the production of which is thus encouraged.

The objection to a discriminating tax upon articles produced under a bounty system is that it opens the doors to retaliations and tariff wars which may be exceedingly harmful to foreign commerce, though conducted within the rules of international law.

The act of August 28, 1894, above referred to, was objected to by Germany on the grounds:

1. That the bounty was a domestic affair of Germany.

2. That Germany could not therefore be inferred as unwilling to fulfill its treaty stipulations based on the most favored nation clause.

3. The view manifested by the legislative body of the United States, "would render the effects of the most favored nation clause illusory, and that it would expose the contracting party to the adoption of arbitrary duties,

[1] The essential characteristic of a bounty is the unnatural, government-bestowed advantage accruing upon production, exportation or sale.

which it is the object of treaties containing the most favored nation clause to prevent." [1]

Mr. Gresham, then Secretary of State, in an instructive opinion written from the free trader's standpoint, held the law to be a violation of treaty obligations,[2] and

[1] Baron Saurma to Mr. Gresham, U. S. For. Rel. 1894, p. 235.

[2] Mr. Gresham in his report to the President noticed above says: The stipulations of those two articles (VIII and IX of treaty of 1828 with Prussia) place the commercial intercourse of the United States and Prussia, not the entire German Empire, on the most favored nation basis,—the first by providing that the duties shall not be higher than "On the like articles being the produce or manufacture of any other foreign country:" the second by providing that any particular favor granted by either party "to any other nation" shall "immediately become common to the other party."

In other words, these stipulations give either party the right, special engagements of reciprocity being excepted, to take the duties levied by the other on articles, the produce or manufacture of any other country, and to demand the same treatment for its own product and manufacture. It is obviously no answer to this to say that certain discriminating duties levied by one party on the products or manufactures of the other are not confined to the latter, or to any country by name, but apply equally to all countries that may happen to fall in a certain category. If there is any other country, or if there are other countries, which, either by name or by a general classification are exempt from the duty (special engagements of reciprocity being excepted) the requirements of the treaty are not fulfilled. To say that the discrimination is not specifically and explicitly national, or that it applies to more than one country, is a mere argumentative subterfuge, inconsistent with the clear intention of the treaty."

Rough Rice case then set out at some length to show how the United States maintained successfully her contention that the exemption from duty of rice from the West Coast of Africa, which though geographical, was nevertheless a real favor to certain rice in which favor American rice should share. The discrimination of the act of 1894 is even more pointedly at variance with the treaty stipulations in question than was the discrimination in the British Acts in 1836, since it imposes, expressly, an additional duty on the article as the produce or manufacture, and because it is the produce and manufacture of a country which may happen to fall within a disfavored category. It is scarcely necessary to say that the question now under consideration cannot be effected by the form in which the discrimination is created . . . whether it is created by granting a duty lower than the general duty or by imposing a duty in addition to the general duty. The form in which the discrimination is created, is no criterion either of its extent or its effect. In reality, in the present case, the discrimination, so far as its effect is now ascertained, would fall on Germany and Austria-Hungary alone, if it fell only on one country or on three or more, the question of treaty construction would remain so long as there was any other country that was favored. An-

the President recommended and secured the repeal of the statute imposing the duty.[1]

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other question, however, is yet to be considered. Can the payment by a Government of a bounty on the exportation of an article of its produce or manufacture be considered in the light of a discrimination which may warrant another Government in laying on the importation of such article an additional or discriminating duty, in spite of a most favored nation stipulation?

The answer seems to be plain, that the payment by a country of a bounty on the exportation of an article of its produce or manufacture for the purpose of encouraging a domestic industry can no more be considered as a discrimination than can the imposition of a protective or practically prohibitive duty on the importation of an article, the produce or manufacture of a foreign country for the same purpose be so considered. The two measures are the same in principle; the question as to which shall be adopted, is a matter of domestic policy. It is a matter in respect of which nations, in stipulating for equality of treatment, have preserved liberty of action. The protective duty on importations and the bounty on exportations are alike intended, whatever may be their effect, to create a national advantage in production or in manufacture. As between the two, the bounty is the more favorable to the inhabitants of foreign countries, since it tends to enable them to get cheaper articles at the expense of the bounty paying government.

Formerly, the Government of the United States paid a bounty on all exported pickled fish, derived from the fisheries of the United States (Sec. 2, Act of July 29, 1813, Stat. L. vol. 3, p. 50). It remained in force for many years; it seemed still to have been in force in 1845. It probably never was imagined that this act created a discrimination which might expose the United States to retaliatory or discriminatory duties at the hands of foreign Governments.

In laying protective duties on foreign articles, instead of paying bounties on domestic products, the immediate effect, if not the object, of the law is to curtail importations; but, so long as the duties imposed are equal on the products or manufactures of all nations, though in practice they may operate most unequally, foreign nations cannot object on legal grounds. They cannot allege discriminations in the treaty sense. It is understood, when treaties against discriminating duties are made, that Governments reserve the right to favor (by duties or by bounties) their own domestic productions or manufacture.

The additional duty, therefore, levied by the acts of 1894 on all sugars coming from bounty paying countries is not responsive to any measure that may be considered as constituting a discrimination by those countries against the production or manufacture of the United States, but is itself a discrimination against the produce and manufacture of such countries. It is an attempt to off-set a domestic favor or encouragement to a certain industry by the very means forbidden by the treaty. F. R. 1894, p. 236

[1] *Ibid.* p. X.

The law was re-enacted in 1897, and protests were received by Austria-Hungary and other countries similar to the ones presented in 1894.[1] On this occasion the Government, which was Republican and strongly protective, denied that there was any unfair discrimination against the goods or products of the complaining States. The Attorney General's opinion, in contradiction to that of Mr. Gresham's, which was pronounced untenable, supports the act for three reasons:

1. From the foundation of the Government, the most favored nation clause had "been invariably construed both as not forbidding any internal regulations for the protection of our home industries, and as permitting commercial concessions which are not gratuitous . . . "

2. The tariff was a statute later than the treaty.

3. "The interpretation of the most favored nation clause, so clearly established as a doctrine of American law, is believed to accord with the interpretation put upon the clause by foreign Powers . . . , certainly by Germany and Great Britain. Thus, as the clause permits any internal regulations that a country may find necessary to give a preference to native merchants, vessels and productions, the representatives of both Great Britain and Germany expressly declared at the International Sugar Conference of 1888 that the export sugar bounty of one country might be counteracted by the import sugar duty of another without causing any discrimination which could be deemed a violation of the terms of the most favored nation clause." [2]

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[1] U. S. For. Rel. 1897. Correspondence with Austria-Hungary, p. 22; with Germany, pp. 175, 177.

[2] Mr. Sherman to Mr. Von Reichenau, U. S. For. Rel. 1897, p. 178.

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